APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-02429-PAC-BNB

THE ESTATE OF GREGORY L. HERRING, by and through David Burford, Esq., GREGORY L. HERRING, JR., a minor child, by and though his Guardian Ad Litem, David Burford, Esq., SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, David Burford, Esq., and, GREGORY Q. HERRING., a minor child, by and through his Guardian Ad Litem, David Burford, Esq.,

Plaintiff(s),

v.

THE CITY OF COLORADO SPRINGS, a municipal entity, GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer, RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer, and, BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendant(s).

MEMORANDUM OPINION AND ORDER

Patricia A. Coan, *United States Magistrate Judge*

This is a §1983 action brought by the Estate of Gregory Herring ("the Estate"). Mr. Herring was an adult male who died tragically after an altercation with Colorado Springs police officers in Mr. Herring's apartment. Mr. Herring's minor children, through their guardian ad litem, are also plaintiffs in this

action. All parties have consented to the jurisdiction of a magistrate judge under 28 U.S.C. §636(c). In the Second Amended Complaint, filed May 2, 2005, the Estate asserts §1983 claims of excessive force, unlawful warrantless entry, and deprivation of substantive due process against the three police officers who were at the scene immediately prior to Mr. Herring's death.[1] The Estate also sues the City for inadequately training its police officers. The minor plaintiffs assert a claim against the defendants for deprivation of their constitutional right of familial association. Plaintiffs seek compensatory and punitive damages.

The matter before the court is Defendants' Motion for Summary Judgment [filed August 1, 2005]. The motion is fully briefed. I heard argument from the parties on November 15, 2005.

I.

The following facts are not disputed, unless otherwise noted. During the afternoon of May 2, 2003, Scott Elder, a resident at the Winfield Apartments in Colorado Springs observed Mr. Herring, an acquaintance who lived in an apartment building across the parking lot from Elder, banging on apartment doors in Mr. Elder's building. (Affidavit of Scott Elder, attached to MSJ, ¶¶1-4) Mr. Herring then began banging violently on Mr. Elder's apartment door. (*Id.* at ¶5) Mr. Elder feared for his safety because Mr. Herring was six feet, two inches tall, and weighed approximately 240 pounds. (*Id.* at ¶¶6-7) Mr. Elder

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[1] On November 18, 2005, I dismissed plaintiffs' official and personal capacity claims against Colorado Springs police chief Luis Velez and plaintiffs' state law tort claims, pursuant to the parties' stipulation.

went to his balcony and called 911 to report Mr. Herring's behavior. (*Id.*) While Mr. Elder was on the phone with the 911 operator, he heard a loud crash, looked out his window again, and observed Mr. Herring's three children running from Mr. Herring's apartment screaming. (*Id.* at ¶8) Mr. Elder then heard another crash and saw Mr. Herring, who had returned to his own apartment, throw a chair out his window. (*Id.*) Mr. Elder reported these events to the 911 operator and ended the call. (*Id.* at ¶9)

Mr. Herring called 911 again a few minutes later to report that Mr. Herring was breaking the windows in his apartment, was throwing items out the windows, was nude, and that his arms were slashed and bleeding and his abdomen cut. (*Id.* at ¶¶10-12) When police officers arrived in the parking lot shortly thereafter, Elder directed them to Herring's apartment. (*Id.* at ¶¶14-15)

Defendant Colorado Springs police officer Gary Darress was the first police officer to respond. Mr. Darress was advised of the information Mr. Elder relayed to the 911 operator while he was en route to the scene. (Affidavit of Officer Gary Darress, attached to Defendants' MSJ, at ¶¶2-3) Darress was also advised that Herring did not have a weapon. (Deposition of Gary Darress, attached to Plaintiffs' Response, at 71)

Mr. Elder directed Officer Darress to Herring's ground level apartment and told Darress that the children had already left the apartment. (Darress deposition, at 80) Darress approached the front of Mr. Herring's apartment and observed a broken window and numerous household items lying on the ground, including several children's items. (Darress Affidavit, ¶6) Darress then looked inside the broken window

and saw items thrown all over the apartment and blood on the walls. (*Id.* at ¶7) Darress heard a grunting or moaning noise coming from someone inside the apartment. (*Id.* at ¶9) Darress did not know at that time whether anyone else was in the apartment with Mr. Herring. (*Id.* at ¶8) Darress then walked around the exterior of the apartment and noticed that every window was broken out and that there was blood throughout the other rooms. (*Id.* at ¶11) When he reached the back of the apartment, he observed Mr. Herring, naked and leaning out the window with his abdomen pressed against the lower broken window frame. (*Id.* at ¶12) Darress also saw cuts on Herring's arms and abdomen. (*Id.* at ¶¶12, 14) Darress suspected that the cuts had been caused by broken glass. (*Id.* at ¶12) Darress introduced himself to Herring as a police officer. (*Id.* at ¶13) Herring continued to throw items out the window. (*Id.*) Herring did not throw any objects at Darress. (Darress Deposition, at 95) Herring also "mumbled or muttered something about war" and expressed concern that Darress was a police officer who might be there to hurt him. (*Id.* at 94) Darress' assessment of the situation was that Mr. Herring might be having a "mental breakdown," was intentionally injuring himself, and was possibly attempting to commit suicide. (Darress Affidavit, ¶14; Darress Deposition, at 87)

Defendant Colorado Springs police officers Carroll and Ambuehl then arrived at the scene separately. (Darress Affidavit, ¶15) Both had been advised that Herring was creating a disturbance and did not have a weapon. (Affidavit of Officer Rory Carroll, attached to MSJ, ¶3; Affidavit of Officer Brent Ambuehl, attached to MSJ, ¶3; Deposition of Rory Carroll, attached to Plaintiffs' Response, at 111) Carroll observed blood on one or two other apartment doors

before responding to Mr. Herring's apartment. (Carroll Affidavit, at ¶5) At Herring's apartment, Carroll and Ambuehl saw officer Darress outside one of several broken apartment windows, telling Mr. Herring to calm down, while Herring threw objects out the window. (Carroll Affidavit, ¶6; Ambuehl Affidavit, ¶7) Carroll observed that Herring had blood on him, but could not determine whether Herring was bleeding, or whether the blood was from someone else. (Carroll Deposition, at 147-148) Although Carroll had been advised by the dispatcher that Herring's children had left the apartment, he was concerned that someone else might be inside with Herring who needed medical attention because of all the blood he observed on Herring and on the doors of other apartments. (Carroll Affidavit, ¶¶31-32) Ambuehl could see that Herring was naked from the waist up, was bleeding, and had blood all over his body. (Ambuehl Affidavit, ¶8) The dispatcher told Ambuehl that children were living with Mr. Herring, but the defendant did not know if any children who might need help immediately were present in the apartment with Herring at that time. (Ambuehl Affidavit, ¶¶3, 9, 34, 35)

Darress, who was the higher ranking officer, determined that officers Carroll and Ambuehl should enter Herring's apartment while Darress distracted Herring at the broken window. (Darress Affidavit, ¶15; Carroll Deposition, at 141) Darress hoped that the other officers could subdue Herring to prevent Herring from continuing to hurt himself and to get him some medical attention, and also to prevent Herring from jumping out the window and injuring himself further or injuring someone else. (*Id.*) Darress did not believe that there were any children in the apartment based on Elder's and Herring's

statements to Darress that the children had left, but he was concerned that someone else, injured and hidden from view, might be inside. (Darress Affidavit, ¶14; Darress Deposition, at 96-97)

Darress instructed Carroll and Ambuehl to kick in the front door after they told him that the door was locked. (Darress Affidavit, ¶16; Carroll Affidavit, ¶7; Ambuehl Affidavit, ¶10) At that time, Carroll and Ambuehl had been present at the scene less than five minutes. (Carroll Deposition, at 123) Carroll walked through the apartment to the bedroom where Herring was standing naked, with blood all over his arm and abdomen. (Carroll Affidavit, ¶10) Carroll also observed blood on the apartment walls. (*Id.*) Officer Ambuehl checked the apartment to see if anyone else was inside, but did not find anyone. (Ambuehl Affidavit, ¶13)

When Herring saw Carroll, he "threw a broken shelf and bottle at [him], which missed. (Carroll Affidavit, ¶11; Carroll Deposition, at 150) The officers' accounts about what happened next are somewhat inconsistent. Carroll stated in his affidavit in support of the summary judgment motion that he sprayed Herring in the face with a single burst of O.C. spray (mace) after Herring began to approach Carroll and ignored Carroll's order to stop. (Carroll Affidavit, ¶11) Carroll testified in his deposition, however, that Herring did not approach him until after Carroll sprayed him with a one-second burst of mace. (Carroll Deposition, at 155-56, 159) Officer Ambuehl testified in his deposition that when he and Carroll entered the apartment, Herring was throwing objects all over the place, and that Carroll sprayed Herring with a one-second burst of O.C. spray at a distance of three to four feet after Herring threw a

few objects in Officer's Carroll's direction and took a step towards Carroll. (Deposition of BrentAmbuehl, at 96-98) Ambuehl stated in his affidavit that Carroll sprayed Herring after Herring ignored Carroll's directive to "calm down and step back." (Ambuehl Affidavit, ¶15)

After Carroll sprayed Herring with the O.C. spray, Herring hesitated for a second, wiped the mace from his face, stated "we are all going to die," and charged at officer Carroll, initiating physical contact. (Carroll Affidavit, ¶12; Darress Affidavit, ¶18; Ambuehl Affidavit, ¶15) Herring grabbed Carroll's left shoulder and pushed him back on to the bathroom floor. (Carroll Affidavit, ¶14) Herring then squeezed Carroll's testicles, causing Carroll to scream in pain. (*Id.* at ¶15) Carroll hit Herring with his fist once in the middle of Herring's back while ordering Herring to let go of him, and struck Herring again after Herring refused to comply. (*Id.*) Herring then released Carroll and again said "we are all going to die." (*Id.*) Ambuehl came into the bathroom, grabbed Herring's feet, and ordered him to stop resisting. (Ambuehl Affidavit, ¶18) Herring was fighting so hard that he was throwing Ambuehl and Carroll around the bathroom. (*Id.* at ¶19)

In the meantime, Officer Darress entered the apartment and grabbed a blanket with which to subdue Herring and to protect the officers from Herring's blood and other bodily fluids. (Darress Affidavit, ¶19) Darress found officers Carroll and Ambuehl on the floor inside a small bathroom, attempting to gain control of Herring. (*Id.* at ¶20) There was water and blood all over the bathroom floor. (*Id.* at ¶21; Ambuehl Affidavit, ¶17) Herring was face down on the floor with Carroll on his left side in the area of Herring's head and shoulders, and

Ambuehl was at Herring's feet. (Darress Affidavit, ¶22; Carroll Affidavit, ¶16; Ambuehl Affidavit, ¶22) Darress attempted to wrap the blanket around Herring, but Herring was struggling too much, and the blanket landed in the bathtub. (Darress Affidavit, ¶23) Carroll struck Herring on the shoulder with his fist in an effort to restrain him. (Carroll Affidavit, ¶17)

Officer Darress positioned himself on Herring's right side as Herring lay face down, took out his handcuffs and handed them to officer Carroll who was able to get one cuff around Herring's left wrist; however, Carroll could not get the other cuff on because Herring was struggling so hard that he was physically lifting Officers Darress and Carroll off the floor. (Darress Affidavit, ¶24; Carroll Affidavit, ¶17; Darress Deposition, at 105) Herring then grabbed Darress' testicles and squeezed hard causing Darress to scream out in pain. (Darress Affidavit, ¶25) Darress hit Herring on the head with the soft side of his fist approximately five or six times before Herring finally let go of him. (*Id.*) Herring then bit officer Carroll's hand. (*Id.* at ¶26; Carroll Affidavit, ¶21) Carroll struck Herring in the side of the face in an effort to get Herring to let go of his hand. (Carroll Affidavit, ¶22; Darress Affidavit, ¶26) While Herring was biting Carroll's hand, Herring also grabbed Darress' baton and pulled it out of its holder. (Darress Affidavit, ¶27) Darress fought Herring to get the baton back. (*Id.*) After Darress secured his baton, Herring continued to fight and Darress struck Herring three or four times on the head using a flat chop (a technique where the officer holds the baton by the short handle and the long extended portion of the baton is parallel to the forearm). (*Id.*) Darress continued to yell at Herring to calm down, but

Herring kept fighting. (*Id.* at ¶28) Darress surmised that Herring was high on a mind altering drug. (*Id.*) Herring then bit Darress on his right knee at which time Darress struck Herring in the head with his fist several times, while yelling at Herring to stop biting him. (*Id.* at ¶29)

While the struggle was going on, Officer Carroll thought that Herring was going after his gun because Herring grabbed his firearm holster twice. (Carroll Affidavit, ¶¶18, 24) Carroll tried to pull Herring's left arm behind his back, but Herring pulled Carroll forward. (*Id.* at ¶19) Carroll struck Herring with his fist on Herring's shoulder. (*Id.*) In another attempt to control Herring's arms, Carroll and Ambuehl attempted to place Carroll's baton under Herring's armpit and tried to pull his arm back to restrain him, but that effort failed. (*Id.* at ¶20; Ambuehl Affidavit, ¶23) Carroll then gave his baton to Ambuehl to use under Herring's legs as a compliance maneuver; when that failed as well, Ambuehl put the baton next to the sink. (*Id.*)

Approximately three minutes after the officers kicked in the door to Herring's apartment, Darress radioed for medical personnel to come in and assist because the police officers had been unable to restrain Herring. (Darress Affidavit, ¶30; Ambuehl Affidavit, ¶¶24-25; Carroll Deposition, at 163) Herring continued to fight and physically lifted Officer Carroll and Darress off the floor. (Darress Affidavit, ¶31) At some point, Darress pressed his thumb into a pressure point on the side of Herring's neck to get him to comply with his commands to calm down, but the maneuver appeared to have no effect. (*Id.*)

Darress was eventually able to handcuff Herring's right wrist, but Herring continued to fight and was

able to push himself up, while Darress was on his back, so that Herring was on his forearms with his upper body propped up off the floor. (Darress Affidavit, ¶¶32, 34) Darress felt that if Herring got to his feet, the officers would not be able to contain him, so Darress pushed down on Herring with his arms and upper body in a jumping motion, lying on Herring's back, in an effort to get Herring to lie down on the ground. (*Id.* at ¶35) Carroll also struck Herring in the back twice with his fist and ordered Herring to get down. (Carroll Affidavit, ¶23) Darress again called for medical personnel to come in and assist. (Darress Affidavit, ¶33)

When fire department personnel and the paramedics entered the apartment and proceeded to the bathroom, they observed that Herring was fighting the officers so hard that they could not control him. (Affidavit of Firefighter/Paramedic Clark Gaddie, attached to MSJ, ¶9; Affidavit of Firefighter Lerry Armstead, attached to MSJ, ¶¶6-8). One of the paramedics gave Herring a shot of Haldol in his buttock which appeared to have no effect. (Gaddie Affidavit, ¶¶12-13; Armstead Affidavit, ¶9; Darress Affidavit, ¶36; Carroll Affidavit, ¶25; Ambuehl Affidavit, ¶27) A second shot, this time of Valium, was administered, and Herring slowly began to calm down. (Gaddie Affidavit, ¶14; Armstead Affidavit, ¶10; Darress Affidavit, ¶36; Carroll Affidavit, ¶26; Ambuehl Affidavit, ¶¶28-29) Darress then confirmed to the paramedic that Herring was breathing. (Gaddie Affidavit, ¶16; Darress Affidavit, ¶37) Because Herring had calmed down, the officers left the bathroom and went outside. (Darress Affidavit, ¶38; Carroll Affidavit, ¶27; Ambuehl Affidavit, ¶30) A few minutes later, Herring stopped breathing, but still had a strong carotid pulse. (Gaddie Affidavit, ¶19)

After Herring was placed in the ambulance he no longer had a pulse. (*Id.*) He received CPR en route to the hospital where he was pronounced dead. (*Id.*)

The record reflects that the paramedic's administration of one injection of 5 mg of Haldol, followed by an injection of 5 mg of Valium, complied with medical procedure and was one half of the medically authorized dose of each medication. (Deposition of Clark Gadde, attached to Plaintiffs' Response, at 50-54)

The only evidence about the cause of Mr. Herring's death is the report of plaintiffs' expert pathologist who opines that Officer Darress' action in pressing his thumb into the front of Herring's neck caused Herring's trachea to collapse, thereby effectively blocking his airway. (Opinion Letterof Linda E. Norton, M.D, attached to Plaintiffs' Response as Ex. G, and accompanying Affidavit, filed November 18, 2005[2]) Dr. Norton determined that Herring went into respiratory arrest before the drugs had an opportunity to reach his bloodstream. (*Id.*) Dr. Norton's opinion also is based on the fact that Herring did not have a pulse when he was placed into the ambulance and that the cardiac monitor in the ambulance showed "profound bradycardia[3] which became asystole[4] during transport." (*Id.*)

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[2] Dr. Norton states that she reviewed the autopsy report for Mr. Herring in preparing her expert report on the cause of Mr. Herring's death. (Plaintiffs' Response, Ex. G) The autopsy report has not been provided to the court.

[3] "Bradycardia" is excessive slowness in the action of the heart, usually with a heart rate below sixty beats per minute. *See* www. online-medical-dictionary.org.

[4] "Asystole" means cessation of the heartbeat. *See id.*

The physical altercation between Herring and the defendant police officers lasted less than thirteen minutes. (Carroll Deposition, at 163-65; Plaintiffs' Ex. E)

II.

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate under Fed. R.Civ.P. 56(c) when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The movant bears the initial burden to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). If this burden is met, the nonmovant must "come forward with specific facts showing that there is a genuine issue for trial as to elements essential to [the nonmovant's claim]." *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993) (internal citations omitted). The nonmovant has the burden to show that there are genuine issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court views the evidence of record and draws all reasonable inferences in the light most favorable to the nonmovant. *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995). To defeat a properly supported motion for summary judgment, "there must be evidence upon which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills*

Bank, N.A., 60 F.3d 1486, 1490 (10th Cir. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). I proceed with caution because only the police officers, who are obviously "interested persons," can testify as to what occurred on that tragic day, while the decedent cannot.

III.

Officers Darress, Carroll and Ambuehl assert the qualified immunity defense in response to plaintiffs' claims against them in their personal capacities.

Qualified immunity shields public officials from civil damages liability if their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a public official raises the defense of qualified immunity, the plaintiff first must establish that the complained of conduct constitutes a violation of a constitutional or statutory right. *See Smith v. Cochran*, 339 F.3d 1205, 1211 (10th Cir. 2003) (internal citation omitted).

If the plaintiff points to sufficient evidence to show that the defendant has violated his constitutional right, the defendant is nonetheless entitled to qualified immunity if his actions were reasonable in light of clearly established law. "A law is "clearly established" for purposes of qualified immunity if there is a Supreme Court or Tenth Circuit decision on point, or if "the clearly established weight of authority from other circuits [has] found the law to be as the plaintiff maintains." *Johnson v. Martin*, 195 F.3d 1208, 1216 (10th Cir. 1999) (quoting *Murrell v. School Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999))(internal citation omitted). To satisfy

the clearly established law requirement, the plaintiff need not identify a case presenting the exact factual situation at hand; instead, the inquiry focuses on whether the public official reasonably should have known, in light of existing law, that his conduct was unlawful. *Johnson*, 195 F.3d at 1216; *accord Anderson v Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (stating that for the law to be clearly established, it must "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("the salient question . . . is whether the state of the law [at the relevant time] gave [defendants] fair warning that their alleged [conduct] was unconstitutional").

If the plaintiff fails to satisfy either part of the bipartite inquiry, the court must grant the defendant qualified immunity. *Smith*, 339 F.3d at 1211. If the plaintiff establishes that defendant's conduct violated a clearly established right, the burden shifts to the defendant to prove that "there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (internal quotation omitted).

A. Warrantless Entry

Plaintiff Estate claims that the defendant police officers' warrantless and non consensual entry of Herring's home violated the Fourth Amendment because the officers did not have probable cause to believe that exigent circumstances existed to justify the entry.

A warrantless entry of an individual's home is presumptively unconstitutional unless the government establishes that an exception to the warrant requirement existed at the time of the entry. *See United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998). Emergency circumstances may, in appropriate cases, make a warrantless entry constitutional. *Id.* "[A]bsent consent or exigent circumstances, police may not enter a citizen's residence without a warrant." *United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir.1997). Police officers may make a warrantless entry if they have a reasonable belief that their own lives or the lives of others are in danger. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.")

The basic elements of the "exigent circumstances" exception are: (1) that law enforcement officers had reasonable grounds to believe that there was an immediate need to protect their lives or others or their property or that of others; (2) the entry was not motivated by an intent to arrest and seize evidence; and, (3) there was a reasonable basis, approaching probable cause, to associate an emergency with the area or place entered. *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1992) (citing *United States v. Smith*, 797 F.2d 836, 840 (10th Cir. 1986)).

The government bears the burden of proving exigency. *Wicks*, 995 F.2d at 970. The government's burden is "particularly heavy where the police seek to enter a suspect's home." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1240 (10th Cir. 2003) (quot-

ing *United States v. Anderson*, 981 F.2d 1560, 1567 (other internal quotation and citation omitted)).

In evaluating whetheran exigency existed atthe time defendants entered Herring's apartment, I examine the circumstances "as they would have appeared to prudent, cautious, and trained officers." *Anderson*, 154 at 1233 (internal citations omitted).

The record shows that Darress, the first officer to arrive at the scene, was told by the dispatcherthat Herring initially had been running around banging on apartment doors; that after Herring returned to his own apartment, he began throwing objects through a broken window; that Herring was nude and his arm and abdomen were cut and bleeding; and that Herring's children had run out of the apartment. Darress was also told that no one had seen Herring with a weapon. When Darress arrived at Herring's apartment, he walked around the perimeter and observed that every window was broken, that objects had been thrown all over the apartment, and that there was blood throughout the inside of the apartment. When Darress reached the room where Herring was standing throwing objects out the window, he did not see Herring with a weapon. Darress did not believe that there were any children remaining in the apartment based on statements made by Elder, the reporting witness, and by Herring, but he did not know whether anyone else was in the apartment. Darress did not see anyone else in the apartment. Darress also believed that Herring was trying to injure himself and might need immediate medical aid. Based on his concerns, Darress instructed officers Carroll and Ambuehl to kick in the door and enter the apartment. Officers Carroll and Ambuehl were concerned that someone else, including more

children, might be in the apartment because of all the blood they saw on Herring, the sidewalk and other apartment doors, along with all of the broken windows.

Under the first element of the exigency analysis, I find that the defendants did not have reasonable grounds to believe that their own lives were in danger before they entered Mr. Herring's apartment. The officers had not received any information that Herring had a weapon, nor did they see Herring with a weapon. Further, although Herring was throwing objects out the window while talking to Officer Darress, he did not throw anything directly at Darress, nor did he threaten Darress or the other officers. Indeed, Darress' confidence in his own safety is evidenced by his deposition testimony that he stood only five feet away from the window during his attempted conversation with Herring. (Darress Deposition, at 92) Accordingly, the warrantless entry was lawful only if defendants had a reasonable belief that someone inside the apartment, including Herring, was in need of immediate aid.[5] Defendants maintain that they had a reasonable basis to believe that Mr. Herring needed immediate medical attention because of the blood they observed on Herring's body and around the apartment, as well as outside the apartment. Defendants also contend that they had a reasonable belief that someone else (possibly the children's mother), might be inside the apartment who needed aid, because of the blood, the destruction

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[5] I note that there is no evidence in the record to suggest, nor do the defendants argue, that the warrantless entry was justified by an immediate need to protect property, such as evidence in a criminal case.

inside the apartment, and the fact that the children ran out of the apartment.

Plaintiff Estate emphasizes that the officers did not have any specific information that Herring had a weapon, that anyone else was inside the apartment, or that Herring had harmed anyone. Plaintiff also argues that it was unreasonable for officers to believe that Herring was seriously injured because he was standing at the window while Officer Darress attempted to converse with him.

Plaintiff Estate maintains that the report of its police policy expert, W. Ken Katsaris, demonstrates the existence of a material factual issue about the legality of defendants' actions. The expert opines:

> The breakdown on proper police procedures began when Darress did not assess that this was a mental health issue and that because there was no threat to Herring or others, that a perimeter be established and communication begun to calm Herring. There was no recognition that *time* was on the side of the police for a resolution without injury to the officers or Herring. The almost immediate entry, when Herring already voiced fear of the officers, escalated the need for force. Furthermore, Darress did not even think to contact his supervisor for assistance with an assessment. Entry in this incident was improper and exacerbated and accelerated a contact before any of the recognized procedures were implemented. It is well recognized that absent a direct and imminent threat, officers should keep their distance and not be threatening with an emotionally disturbed person.

Plaintiffs' Ex. H, at ¶D.6 (Emphasis in the original). The Estate's expert concludes that defendants acted

improperly in entering the home of an individual who appeared to be emotionally disturbed instead of following "recognized procedures."[6] The substance of those procedures have not been provided to the court. Defendant Ambuehl testified in his deposition that during an academy training session prior to May 2003, he received some general written guidelines about interacting with emotionally disturbed persons. (Ambuehl Deposition at 42) The guidelines, as discussed in Officer Ambuehl's deposition,[7] state the following general principles for police officers:

(1) stay calm and don't overreact;

(2) gather information from family or bystanders;

(3) indicate that you are there to understand and help;

(4) speak simply and briefly and move slowly;

(5) remove distractions, upsetting influences, and disruptive people from the scene;

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[6] I note that, to the extent that plaintiffs' expert's determination that the warrantless entry was "improper" because "there was no threat to Herring or others," Plaintiffs' Ex. H, at ¶D.6, was, in part, an opinion about the existence of exigent circumstances sufficient to justify a warrantless entry, that opinion is inadmissible as an ultimate legal conclusion. *See Zuchel v. City and County of Denver*, 997 F.2d 730, 742-43 (10th Cir. 1993)(holding that expert may state an opinion on whether conduct at issue fell below accepted standards in the field of law enforcement but may not give an opinion on the constitutionality of the conduct); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1328 (10th Cir.1998)(holding that an expert may not "state legal conclusions drawn by applying the law to the facts.")).

[7] The written guidelines have not been provided to the court.

(6) recognize that the person may be overwhelmed by sensations, thoughts, frightening beliefs, sounds, voices orthe environment;

(7) be friendly, patient, accepting and encouraging, but remain firm and professional; and

(8) Be aware that your police uniform, gun, handcuffs, and nightstick may frighten the person. Reassure the individual that you don't intend harm.

(*Id.* at 43-53)

Even if the defendants did not employ some of the above guidelines or other "recognized procedures" for interacting with the mentally ill, police officers cannot be held liable under §1983 solely on the basis that their conduct does not comport with police policies and procedures. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *see, also*, *Medina*, 252 F.3d at 1133 (recognizing that claims based on violations of state law and police procedure are not actionable under § 1983) (internal citations omitted). Thus, even if the preferred course of action would have been, as plaintiff Estate suggests, to continue a non confrontational dialogue with Mr. Herring and to call for someone in the police department who had more specialized training in dealing with the mentally ill instead of making an immediate entry, the reasonableness standard does not require police officers to use "alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983); *see, also, United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("The question posed by the fourth amendment

is not whether it would have been reasonable to get a warrant, but whether the [entry] itself was reasonable") (citing *United States v. Edwards*, 415 U.S. 800, 807 (1974)).

The reasonableness of defendants' warrantless entry is a close question. The reporting witness and Herring advised Darress that Herring's children had left the apartment; the officers did not receive any specific information that Herring had been involved in a physical altercation with another person, or that anyone else was inside the apartment; and, the officers did not observe anyone through the windows. Moreover, Herring did not make any verbal threats to the police officers; Herring's presentation to Officer Darress was not physically threatening; and, Herring did not possess a weapon to the officers' knowledge.

A police officer's subjective belief that someone inside might need immediate aid, without more, does not justify a warrantless entry. *See United States v. Arch*, 7 F.3d 1300, 1304 (7th Cir. 1993); *see, also, United States v. Musa*, 401 F.3d 1208, 1217 (10th Cir. 2005) (Henry, J., concurring) (stating that officers' testimony that he was concerned because the police lacked knowledge about the inside of the residence and that the lack of knowledge was potentially dangerous did not establish exigent circumstances sufficient to justify a warrantless entry).

In *Arch*, the Seventh Circuit held that exigent circumstances justified officers' warrantless entry of the defendant's hotel room where the defendant answered the officers' knock on his door with a knife in hand; defendant was behaving in an agitated and bizarre manner; the hotel room was torn apart with furniture overturned; and, the floor was littered with syringes and a bloody rag. 7 F.3d at 1304-05. The

Seventh Circuit reasoned that even though the officers had not received any information that the defendant had injured another person or that another person had been in the hotel room, the officers' observation of the defendant's behavior and the contents of the room "made it reasonable for them to believe that there might be someone else present who needed medical attention." *Id.* at 1305.

Here, the circumstances supporting a finding of exigency are not as strong as they were in *Arch* because the defendants did not have any information that Mr. Herring was armed, nor did they observe him with a weapon; however, Mr. Herring was a large man and the absence of a weapon does not negate a finding of exigency. For example, in *Keeney v. City of New London*, 196 F.Supp.2d 190 (D.Conn. 2002), the district court upheld police officers' warrantless entry of the unarmed plaintiff's apartment based on the officers' reasonable belief that plaintiff posed a danger to himself or others. The officers had responded to a report that plaintiff was "acting strangely and breaking tree limbs" and during police contact the plaintiff "assumed a fighting stance and rambled incoherently" and then fled from police officers who followed plaintiff to an apartment building. *Id.* at 194-197. The apartment building manager told the officers that the plaintiff had probably stopped taking his medication and let the officers into plaintiff's apartment. *Id.* at 195. Here, although Mr. Herring was in his apartment at the time of the police contact, he had previously been outside banging on other apartment doors where he left traces of blood; he destroyed the contents of his apartment and broke out all the windows; his children ran out of the apartment; Herring was bleeding; and there was

blood throughout the apartment which may or may not have belonged to Herring.

Further, although Mr. Herring had not verbalized a threat to commit suicide, he had bleeding lacerations on his arm and abdomen. A cautious and prudent police officer may have reasonably perceived those lacerations as a suicidal gesture in light of Mr. Herring's other bizarre behavior. *Contrast Sepatis v. City and County of San Francisco*, 217 F.Supp.2d 992 (N.D.Cal. 2002) (holding that exigent circumstances did not justify officers' warrantless entry of plaintiff's home on two occasions where neighbors reported bizarre and loud behavior by plaintiff, but did not report that he had a weapon, plaintiff had not threatened the neighbors, police officers did not observe plaintiff with a weapon, officers did not reasonably fear for their safety, and plaintiff had not made any suicidal gestures and demonstrated lucidity when police officers spoke to him).

Upon careful review of the record, I find that even if defendants' belief that someone inside Mr. Herring's apartment, including Mr. Herring, might be in need of immediate aid—based on Herring's behavior in banging on the doors of other apartments, in ransacking the inside of his apartment, in breaking out all of his apartment windows, and in somehow cutting himself on the arm and abdomen, together with the blood on Mr. Herring and throughout the inside of his apartment, the officers' inability to discern whether all of the blood came from Herring, and the fact that Mr. Herring appeared to be emotionally disturbed or on drugs—was not objectively reasonable, the unlawfulness of the warrantless entry was not apparent to the defendants in light of pre-existing law. *Anderson*, 483 U.S. at 640. Stated

otherwise, although an individual's right to be free from a warrantless entry into his home absent exigent circumstances is clearly established under *Mincey v. Arizona* and *United States v. Wicks*, existing law did not put a reasonable police officer on notice in May 2003 that the warrantless entry in the circumstances of this case was clearly unlawful. *See Saucier*, 533 U.S. at 206 (recognizing that the qualified immunity doctrine "operates to grant officers immunity for reasonable mistakes as to the legality of their actions.") Plaintiffs have not cited any cases to the contrary.[8] Accordingly, the individual defendants are entitled to qualified immunity on the plaintiff Estate's claim that defendants' warrantless entry of Mr. Herring's apartment violated his Fourth Amendment rights.[9]

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[8] Plaintiff relies on *Myers v. Okla. Cnty. Bd. of Cnty. Commis*, 151 F.3d 1313 (10th Cir. 1998); however, that case is factually distinguishable. In *Myers*, the Tenth Circuit held that police officers' entry into an armed suicidal person's apartment did not unreasonably create the need to use deadly force against that person because the officers had spent hours attempting to resolve the situation through communications with the individual and had ultimately secured a court order authorizing them to take the decedent into protective custody. 151 F.3d at 1320. The holding in *Myers* cannot be construed to stand for the proposition urged by the plaintiff Estate: that it is unreasonable as a matter of law for police officers to enter the home of an emotionally unstable person without a warrant before attempting to engage in lengthy non confrontational communications with that individual.

[9] Consideration of the second and third factors of the exigency analysis do not compel a different result. Under the second factor, there is no evidence that the officers' entry was motivated by an intent to arrest and seize evidence. Once inside the apartment, the officers checked the other rooms to determine that no one else was present, and then proceeded to the room

B. Constitutionality of Officers' Use of Force

The Estate next claims that the defendant officers used unconstitutionally excessive force against Mr. Herring.

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." A "seizure" occurs when an officer's show of authority during a police-citizen encounter succeeds in restraining the citizen. *See Latta v. Keryte*, 118 F.3d 693, 698 (10th Cir. 1997) (internal citation omitted); *see, also, United States v. Harris*, 313 F.3d 1228, 1234 (10th Cir. 2002) ("Ultimately, a seizure requires either the use of physical force by the police officer or submission by the individual to the police officer's assertion of authority")(citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). Here, Mr. Herring was seized when the officers used physical force in their efforts to handcuff him after he charged at Officer Carroll, grabbed Carroll's shoulder, and pushed the defendant to the floor, in response to being sprayed with mace. Accordingly, I analyze Mr. Herring's excessive force claim under the Fourth Amendment.

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where Herring was located. (Ambuehl Deposition, at 88-90) Under the third factor, the same facts which supported defendants' belief that there was an immediate need to protect the lives of others are the same facts they rely on to show that they had a reasonable basis, approaching probable cause, to associate an emergency with the area or place entered.

The reasonableness of a particular use of force must be assessed based on the totality of the circumstances, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. "Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier*, 533 U.S. at 205 (internal citations and quotations omitted).

The court should consider an individual's apparent mental instability as part of the totality of the circumstances in assessing the reasonableness of the force used against that person. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("The diminished capacity of a unarmed detainee must be taken into account when assessing the amount of force exerted"); *Abdullahi v. City of Madison*, 423 F.3d 772, 763 (7th Cir. 2005) (recognizing that officers' awareness of decedent's mental disability may be relevant to reasonableness of force used against decedent); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (concluding that the mental state of an emotionally disturbed person and police guidelines regarding contact with emotionally disturbed persons are relevant in assessing the reasonableness of an officer's use of deadly force); *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in deter-

mining . . . the reasonableness of the force employed"); *see, also, Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1188-89 (10th Cir. 2001) (holding that use of hog-tie restraint on person with apparent and discernible diminished mental capacity is unconstitutional). However, "[k]nowledge of a person's disability . . . cannot foreclose officers from protecting themselves . . . when faced with threatening conduct from the disabled individual." *Bates exrel. Johns v. Chesterfield Cnty., Va.*, 216 F.3d 367, 372 (4th Cir. 2000); *see, also, Unzueta v. Steele*, 291 F.Supp.2d 1230, 1238 (D.Kan. 2003) (concluding that state hospital staff members' use of non deadly force to restrain a mentally ill patient who hit another staff member hard in the face was not constitutionally excessive).

1. Whether Defendants Unreasonably Created the Need to Use Force

The plaintiff Estate first argues that the defendants unreasonably and recklessly caused the need to use deadly force against Mr. Herring when they kicked in the door of his apartment within five minutes of their arrival and sprayed him with mace once inside the apartment, causing Herring to physically attack Officer Carroll. Plaintiff argues that Herring did not threaten any of the officers, or attempt to flee, before he was sprayed with mace and that Herring was outnumbered by police officers three to one.

An officer's conduct before an individual threatens force is relevant to the issue of whether the officer reasonably believed he was in danger at the time he used force, if the officer's conduct was "immediately connected" to the seizure and the threat of force. *Bella v. Chamberlain*, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994) ("Obviously, events immediately connected

with the actual seizure are taken into account in determining whether the seizure is reasonable"); *Sevier v. City of Lawrence, KS*, 60 F.3d 695, 699 (10th Cir. 1995) (stating that the reasonableness of the defendants' use of force "depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force"); *Allen v. City of Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (citing *Sevier*).

I have concluded that the individual defendants are immunized from liability on the plaintiff Estate's claim that their warrantless entry of Mr. Herring's apartment violated Mr. Herring's Fourth Amendment rights. Accordingly, I limit my analysis of the reasonableness of defendants' pre-seizure conduct to Officer Carroll's use of pepper spray against the decedent after entering Herring's apartment.

The record shows that after Officers Carroll and Ambuehl entered Mr. Herring's apartment, at Officer Darress' instruction, and that Carroll walked to the back bedroom where Herring had been standing at the window throwing objects outside. It is undisputed that Herring looked at Carroll and threw a broken shelf and a bottle at Carroll. Because the officers' testimony about whether Herring also took a step towards Carroll, and whether Carroll ordered him to "stop" or "step back" is inconsistent, I construe the evidence in plaintiffs' favor and assume that Herring did not move towards Carroll, and that Carroll did not order Herring to stop, before Carroll deployed a single burst of OC spray against him. (Carroll Deposition, at 155-56) After Herring was sprayed, he stated "we are all going to die," and charged at

Carroll, knocking him to the ground. The physical brawl which resulted in Mr. Herring's death ensued.

A police officer's use of pepper spray is objectively reasonable force where the recipient is resisting arrest, refusing to comply with police requests, or acting in a threatening or violent manner. *See Vinyard v. Wilson*, 311 F.3d 1340, 1348 n.12 (11th Cir. 2002) (collecting cases). In contrast, courts have concluded that using pepper spray is constitutionally excessive in cases where the individual is not ignoring police commands or instructions, is not acting in a threatening or violent manner, or when the arrestee surrenders or is secured, and has been rendered helpless. *Id.* n.11 (collecting cases).

Plaintiff Estate relies on the opinion of its police procedures expert that defendants "had no knowledge of the research on the use of OC against the mentally ill, and the application in this incident escalated the need for force." (Plaintiff's Ex. H, at ¶D.5) However, the expert's opinion does not discuss any research studies or other pertinent authorities which have concluded that the use of OC spray is contra indicated for the mentally ill because it is likely to provoke a violent response. Moreover, although Carroll testified in his deposition that he recognized that Mr. Herring might be mentally ill based on his observations of Herring after he was inside the apartment, but before he deployed the mace,[10] Car-

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[10] Carroll did not have any contact with Herring before the forcible entry which occurred only five minutes after Carroll and Ambuehl arrived at the scene. (Carroll Deposition, at 134) Carroll testified in his deposition that he did not perceive that Mr. Herring might be mentally ill until he was inside the apartment and heard Herring make some irrational comments about "God" and that they were all "going to die." (*Id.* at 161-62)

roll also testified that he had not received any training cautioning or prohibiting the use of mace against persons who appear to be mentally ill.[11] (Carroll Deposition, at 121) Carroll further testified that he was trained generally to use OC spray as a method to calm down an agitated or excited individual so that the individual could be taken into custody without further incident. (Carroll Deposition, at 154)

There is no evidence in the record that the defendants failed to comply with any Colorado Springs Police Department procedures regarding the use of mace generally. *See Nelson v. County of Wright*, 162 F.3d 986, 991 (10th Cir. 1998) (recognizing that it may be appropriate for district court to consider whether the defendants complied with standard police procedures in analyzing an excessive force claim).

The material facts supporting plaintiff's excessive force claim are undisputed, except for Officer Carroll's internally inconsistent testimony relating to his deployment of mace against Mr. Herring. I have resolved that inconsistency in Mr. Herring's favor, as I am required to do when considering a motion for summary judgment. *See Thomas*, 48 F.3d at 484. I thus decide as a matter of law whether the officers' actions were objectively reasonable. *See Medina*, 252 F.3d at 1131.

I find that the objective reasonableness of Officer Carroll's use of pepper spray against Mr. Herring is a close question. The defendants did not enter Herr-

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[11] Defendants Darress and Ambuehl also testified in their depositions that they had not been trained about possible negative effects associated with the use of mace on the mentally ill at the time of the incident. (Darress Deposition, at 63; Ambuehl Deposition at 20-25)

ing's apartment to arrest him, but rather for the stated purpose of "subduing" him[12] so that they could get him medical attention. After a cursory search of the apartment which revealed that no one else was inside, defendants had no reasonable basis to believe that Mr. Herring had harmed another person or committed a crime, and the evidence construed in plaintiff's favor shows that Herring did not disobey any instructions or orders from the defendants before the mace was deployed against him. However, Mr. Herring did act aggressively toward Officer Carroll by throwing objects at the defendant, including a broken shelf. Although the objects did not actually hit Carroll, Mr. Herring had demonstrated threatening and violent behavior immediately before the officers' arrival in ransacking and breaking out all the windows in his apartment, and in engaging in unknown actions which resulted in two lacerations

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[12] Officer Darress stated in his affidavit in support of the summary judgment motion that he ordered Officers Carroll and Ambuehl to enter Herring's apartment so that they could "subdue Mr. Herring so that we could prevent Mr. Herring from continuing to hurt himself, get Mr. Herring medical attention, and prevent Mr. Herring from jumping out the broken window and either injuring himself further or becoming a threat to others." (Darress Affidavit, at ¶15) However, Darress did not convey his plan to the other officers. Officer Carroll testified that he did not have any conversation with Darress before entering the apartment, other than regarding the entry itself. (Carroll Deposition, at 134-139) Officer Ambuehl testified that Officer Darress did not explain to Ambuehl the basis for Darress' decision that they should enter the apartment. (Ambuehl Deposition, at 87) Accordingly, it is not clear what Carroll and Ambuehl intended to do with Herring once they were inside his apartment and after they had determined that no one else was present.

and blood on Herring's body as well as blood smeared on walls throughout the apartment.

The facts in *Riggs v. City of Pearland*, 177 F.R.D. 395 (S.D.Tex. 1997) are somewhat similar. There, the district court held that police officers' use of mace against an unarmed plaintiff was constitutional where officers responded to a 911 call of a possible disturbance at the plaintiff's apartment, officers observed through the window that the plaintiff was throwing himself around the room in his underwear and had a laceration on the right side of his head, officers entered the apartment and attempted to subdue the plaintiff, and officers sprayed the plaintiff with mace after plaintiff "crawled rapidly" towards the officers. *Id.* at 408.

Moreover, the single, one-second burst of spray, from a distance of three to four feet, appeared to have no effect on Mr. Herring and there is no medical evidence to the contrary. Although the lack of a physical injury does not preclude an excessive force claim, *see Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001), it is one factor for the court to consider in the totality of the circumstances analysis. *See Nelson*, 162 F.3d at 990 (internal citation omitted).

I find and conclude that to the extent that Carroll's use of mace against Mr. Herring implicates the Fourth Amendment,[13] the individual defendants are

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[13] If the OC spray was deployed as part of the defendants' efforts to effect a seizure of the decedent, the officer's use of force is analyzed under the Fourth Amendment. *See Graham*, 490 U.S. at 395. As discussed in note 12, *supra*, it is unclear whether Officer Carroll intended to effect a seizure of Mr. Herring when he entered the apartment. The plaintiff Estate has also raised its excessive force allegations in the context of a

entitled to qualified immunity on the plaintiff Estate's claim that the use of mace constituted unlawful excessive force. Even if it was not objectively reasonable for Officer Carroll to perceive Herring's actions in throwing a broken shelf and bottle at him as a threat to the defendant's safety so that the use of pepper spray was unconstitutionally excessive, the unlawfulness of Officer Carroll's conduct was not apparent in light of existing law. An individual's Fourth Amendment right to be free from excessive force was clearly established in *Graham*; however, the contours of that right were not sufficiently clear that a reasonable police officer would know that using mace against Mr. Herring under the circumstances Officer Carroll confronted violated that right. Likewise, there is no clearly established law holding that the use of mace on persons who appear to be mentally unstable is *per se* excessive force.

Because defendants are immune from liability on the plaintiff Estate's claim that Officer Carroll used excessive force against Mr. Herring when he deployed a single burst of mace against Mr. Herring, I cannot consider the use of mace as conduct that unreasonably created the need to use force against the plaintiff in the physical struggle between Herring and the defendants that followed. Accordingly, the three Tenth Circuit cases upon which plaintiff primarily relies in support of his claim are inapposite.[14]

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substantive due process claim. Accordingly, in the event that the deployment of mace was conduct unrelated to defendants' efforts to seize Mr. Herring, I analyze it separately under the Fourteenth Amendment Substantive Due Process Clause in Section III.D., *supra*.

[14] In *Sevier* and *Allen*, the Tenth Circuit held that summary judgment was inappropriate on the plaintiffs' excessive force claims where police officers responded to 911 calls reporting

armed and possibly suicidal individuals, the officers immediately confronted the armed suicidal persons without considering other non-confrontational options, and the confrontations ultimately resulted in the police shooting deaths of the individuals. *Sevier*, 60 F.3d at 698-699; *Allen*, 119 F.3d at 839-841. In both cases, the Tenth Circuit held that if the plaintiff's version of the facts was believed, the officers' conduct could be construed by the jury as reckless or deliberate conduct that unreasonably created the need for the officers to use deadly force. *Sevier*, 60 F.3d at 701 n.10; *Allen*, 119 F.3d at 841.

Plaintiff relies on *Myers* to show how police officers should act in encounters with the mentally ill. In *Myers*, the Tenth Circuit held that police officers' entry into an armed suicidal person's apartment did not unreasonably create the need to use deadly force against that person because the officers had spent hours attempting to resolve the situation through communications with the individual and had ultimately secured a court order authorizing them to take the decedent into protective custody. 151 F.3d at 1320.

As discussed in the text above, the individual defendants cannot be held personally liable for unreasonably creating the need for the officers to use deadly force against Mr. Herring based on their actions in entering his apartment without a warrant and in spraying him with mace because I have concluded that defendants are entitled to qualified immunity. However, even if I did consider the merits of the plaintiff Estate's claim that the warrantless entry and use of mace unreasonably created the need to use physical force against the decedent, I note that the evidence does not show that the defendants acted recklessly. Unlike the factual circumstances in *Sevier, Allen,* and *Myers*, Mr. Herring was not armed with a deadly weapon. A reasonable jury could not conclude from the evidence of record that the officers acted with a reckless disregard for Mr. Herring's or their own safety when they entered his apartment and sprayed him with mace. There is no evidence in the record that the defendants had any knowledge that the use of mace against an unarmed mentally ill person is likely to result in a potentially deadly physical confrontation, and such a risk is not patently obvious. The Tenth Circuit has made clear that "in order to constitute excessive force, the conduct arguably

2. Defendants' Use of Physical Force

The plaintiff Estate next argues that defendants' use of deadly force against Mr. Herring in their efforts to restrain him after spraying him with mace was unreasonable. Plaintiff emphasizes that Herring was lying face down on the floor with officers on top of him when Officer Darress exerted the force against Herring that allegedly caused Herring's death.

Defendants do not rebut the report of plaintiffs' expert pathologist, Linda Norton, M.D., P.A. Dr. Norton opines that Mr. Herring's death was caused by Officer's Darress' application of pressure to Mr. Herring's neck, causing his trachea to collapse and thereby blocking his airway. Defendants argue, however, that "[t]he Officers at no time resorted to deadly force." (Brief in Support of Motion for Summary Judgment, at 24)

The Tenth Circuit has adopted the Model Penal Code's definition of "deadly force." *See Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (citing *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n. 11 (10th Cir.1987)). The Model Penal Code defines "deadly force" as: "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm." Model Penal Code § 3.11(2) (1985).

There is no evidence that Darress applied pressure to Herring's neck for the purpose of causing Herring's death; however, Darress testified in his deposition that he knows that contact with a suspect's neck can

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creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence." *Medina*, 252 F.3d at 1132.

cause severe injury or even death and may constitute deadly force in certain situations. (Darress Deposition, at 63) I find that Darress's application of pressure to Herring's neck created a substantial risk of causing death or serious bodily harm and therefore constituted the use of deadly force.

A police officer may use deadly force against an individual if the officer has probable cause to believe that the individual poses a threat of serious physical harm either to the officer or to others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Sevier*, 60 F.3d at 699 (citing *Garner*); *Carr v. Castle*, 337 F.3d 1221, 1227 (10th Cir. 2003).

An individual may pose a threat of serious physical harm to police officers even if he does not possess a firearm, knife, or other deadly weapon. In *Ryder*, the Tenth Circuit held:

> Certainly, whether a suspect is armed is a relevant factor in determining whether the suspect poses an immediate danger. A per se rule, however, that a police officer may never employ deadly force unless attacked by a suspect possessing a deadly weapon would place a police officer in a dangerous and unreasonable situation. Therefore, we conclude that whether a particular seizure is reasonable is dependent on the "totality of the circumstances," [internal citation omitted], and not simply on whether the suspect was actually armed. [internal citation omitted].

814 F.2d at 1419 n.16; *see, also, Nelson*, 162 F.3d at 990-91 (concluding that officer's use of deadly force against unarmed suicidal person was not constitutionally excessive where individual resisted officer's

efforts to handcuff him and during ensuing struggle, reached for the officer's gun, hit and kicked the officer repeatedly, and shoved officer onto the floor into a closet).

The evidence shows that during the physical struggle leading up to Officer Darress' application of pressure to Mr. Herring's neck, Herring pulled Officer Darress' baton out of its holster during the struggle and also grabbed Officer Carroll's firearm holster twice, which caused Carroll to believe that Herring was going for his gun. Herring also squeezed the testicles of two officers during the fight and bit two officers-one on the hand and one on the leg. The officers responded to Herring's actions by hitting him in the head and body with their fists and using one of their batons in a flat chop maneuver. The officers also tried unsuccessfully to restrain Herring's arms and legs with the baton. After Officer Darress called for medical assistance to help subdue Herring, Herring continued to fight and lifted Officers Carroll and Darress, who were positioned on either side of Herring (and who must have been partially lying on the decedent), up off the floor. Knowing that the maneuver was deadly force, Officer Darress pressed his thumb into a pressure point on the side of Herring's neck to get Herring to stop fighting them. Darress believed that the pressure application had no effect because Herring continued to struggle. Darress was finally able to handcuff both of Herring's hands in front of him and again called for medical personnel to assist them. Herring then pushed himself off the floor onto his forearms while Darress was on his back. Darress, believing that he and the other officers would not be able to contain Herring if he was able to get to his feet, pushed Herring back down to the floor, using his arms and upper body in a "jumping mo-

tion." At that point, the paramedics came into the apartment and administered medication to Herring. Herring slowly began to calm down and the defendants exited the apartment while the paramedics attended to Mr. Herring.

An officer's use of deadly force is reasonable where the person seized makes an attempt to get the officer's gun. *See Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005); *Nelson*, 162 F.3d at 990-91. Here, there is no evidence that Officer Darress knew that Mr. Herring had twice attempted to grab Officer Carroll's gun when Darress applied deadly force to Herring. Moreover, although Herring was able to grab Darress' baton, Darress regained control of the baton before Herring was able to use it to inflict any injury. Further, Herring was outnumbered by police officers three to one, was not suspected of committing any crime, and was not armed. Although Mr. Herring was wet and naked and was demonstrating superior strength so that the defendants were having difficulty subduing him, the evidence does not establish as a matter of law that Herring's actions in biting and squeezing the testicles of the officers, and in grabbing Officer Darress' baton, gave Officer Darress probable cause to believe that Herring posed a threat of serious physical harm to the officers sufficient to justify the use of deadly force against him. On this record, therefore, I cannot conclude that Officer Darress' use of deadly force was objectively reasonable under the Fourth Amendment, nor can I conclude that defendant Darress is entitled to qualified immunity because the law was clearly established in *Tennessee v. Garner*, *Graham* and *Sevier* that a police officer may not use deadly force against an individual unless the officer has probable cause to believe that the individual poses a threat of serious physical harm

either to the officer or to others. The contours of Mr. Herring's right to be free from police use of deadly force were sufficiently clear that a reasonable police officer in the circumstances confronted by Darress, who knew that application of pressure to an individual's neck could result in death, would have known that his conduct was unlawful. Stated otherwise, defendant Darress did not make a reasonable mistake as to what the law requires because the circumstances "do not disclose substantial grounds for [Darress] to have concluded he had legitimate justification under the law for acting as he did." *Harrington*, 268 F.3d at 1197 (citing and quoting *Saucier*, 533 U.S. at 207-08). Defendants' motion for summary judgment on the excessive force claim is denied as to defendant Darress.

I grant summary judgment in favor of defendants Carroll and Ambuehl on the Plaintiff Estate's excessive force claim, however. Officer Ambuehl's use of force was limited to attempts to restrain Herring's legs with his hands and baton. Officer Carroll's actions in hitting Herring on the back and shoulder in response to Herring's actions in squeezing his testicles, in biting him and in using his baton to attempt to restrain Herring's arms were objectively reasonable under the circumstances. There is no evidence that any of the force used by Carroll or Ambuehl was a cause of Mr. Herring's death.

C. Constitutional Claim against City for Failure to Train

Plaintiff Estate sues the City of Colorado Springs under §1983 for not adequately training its police officers in appropriate methods of interacting with

mentally ill individuals,[15] including the use of force, restraint, and chemical sprays as applied to mentally ill individuals. Plaintiff does not allege any deficiency in the City's officer training on the use of force regarding persons who are not mentally ill.

A municipality or other local government cannot be held liable under §1983 unless a municipal policy or custom was the "moving force" behind a constitutional violation. *Bd. of Cnty. Commis v. Brown*, 520 U.S. 397, 404 (1997); *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978). Inadequate police training can be the basis of §1983 liability only if the failure to train amounts to deliberate indifference to the constitutional or statutory rights of persons with whom the police come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Brown*, 520 U.S. at 411. Even if inadequate training is demonstrated, the lack of proper training must actually cause the plaintiff's injury to be actionable under §1983. *City of Canton*, 489 U.S. at 391.

To establish municipal liability under §1983 for inadequate training of police officers, a plaintiff must show that officer training was in fact inadequate and then satisfy the following requirements: (1) the officers violated the Constitution; (2) the constitutional violation arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers

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[15] Although there is no evidence in the record that Mr. Herring had a history of mental illness, after they responded to his apartment, defendants recognized that Mr. Herring was acting in a manner consistent with that of a mentally ill person. (Darress Deposition, at 87-88; Carroll Deposition, at 161-62).

come into contact; and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. *Allen*, 119 F.3d at 841 (internal citation omitted); *Carr*, 337 F.3d at 1228. "Evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability." *Allen*, 119 F.3d at 842 (internal citation omitted).

I initially find that the Plaintiff Estate has met its burden on summary judgment to demonstrate the existence of material factual issues about the adequacy of the training defendants received with respect to police interactions with the mentally ill. The record reflects that defendants received some training in dealing with mentally ill persons; however, none of the defendants had any specific recollection of the content of that training. (Darress Deposition, at 22-26; Carroll Deposition, at 33; Ambuehl Deposition, at 20-22) Chief Velez testified that, at the time of Mr. Herring's death, the Colorado Springs Police Department had written policies and procedures relating to officer interaction with the mentally ill, but he too could not recall the content of those policies. (Deposition of Colorado Springs Police Chief Luis Velez, at 135) The court's record does not contain any written policies or procedures directed to police officer contact with individuals who appear to be mentally disturbed. The only evidence about the content of the City's policies is in Officer Ambuehl's deposition testimony, discussed in Section III.A., *supra*, about some written guidelines he received in police academy training.

Moving on to the other requirements for municipal liability, I will assume, under the first factor, that defendants violated Mr. Herring's Fourth Amendment rights when they entered his apartment without a warrant and sprayed him with mace based on my conclusions in Sections III.A. and III.B.1, *supra*, that the defendants are entitled to qualified immunity under the clearly established law prong of the inquiry, even if their conduct violated the Constitution.[16] In addition, genuine issues of material fact remain about whether defendant Darress' application of pressure to Mr. Herring's neck was lawful under the Fourth Amendment.

Plaintiff Estate also has satisfied its burden on summary judgment under the second factor because the evidence shows that it is common for Colorado Springs police officers to have encounters with mentally ill or emotionally disturbed people. (Velez Deposition, at 66-67; Darress Deposition, 29; Carroll Deposition, at 25).

The third and fourth factors are a closer question. A plaintiff may establish the deliberate indifference

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[16] Generally, a City cannot be held liable where there is no underlying constitutional violation by one of its officers or employees. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Myers*, 151 F.3d at 1317 (recognizing that plaintiffs' failure to train claims against the City required a predicate showing that the officers used excessive force against the plaintiff). An exception arises, however, when the court or jury finds that even if the officer committed a constitutional violation, he is nonetheless entitled to qualified immunity because his conduct did not violate clearly established law. *Myers*, 151 F.3d at 1317. In such cases, the claim against the City can proceed because municipalities do not enjoy the same immunity from liability. *Id.*

element of a municipal policy in accordance with the Supreme Court's following reasoning in *Canton*.

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Canton, 489 U.S. at 390. In *Brown*, the Supreme Court further explained its holding in *Canton:*

> [I]n a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle the situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequences of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.

Brown, 520 U.S. at 409.

It is not enough to show "that an injury or accident could have been avoided if an officer had better or

more training, sufficient to avoid the particular injury-causing conduct." *See Canton*, 489 U.S. at 391. Instead, the plaintiff's evidence must demonstrate that the lack of adequate training reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision not to train. *Brown*, 520 U.S. at 411.

Plaintiff Estate relies heavily on its police policies expert who opines:

> Darress, along with Officers Carroll and Ambuehl, did not activate to respond to Herring's condition or activity in any manner consistent with the police recognized standard of care for either recognizing, approaching, responding to or communicating with a mentally ill or emotionally disturbed person—especially one situated like Herring, who was in his apartment, alone, and not threatening anyone while experiencing this episode.
>
> While the officers later acknowledge in their depositions that they accept there are factors that were exhibited by Herring that would have led to the conclusion he was mentally ill, and that there are practices that suggest a proper response, there was not a hint of their implementing this response. Likely, the reason was a lack of training provided by the CSPD for contact with this special population. Admittedly, there was some training in their basic training program on the police response to the mentally ill, [sic] the time spent and amount of training fell far short of the recognized standard of care for digesting the basics of response to the emotionally disturbed. The training was of such a minuscule amount for such a likely encounter

> by a police officers that the amount of training simply reached a level of deliberate indifference because of the significance of the potential contact with people who are mentally ill, and emotionally disturbed. The officers indicated that hundreds of such contacts have been made with this special population by the CSPD in the last five years. Such a core responsibility must be met with a concomitant training curriculum so that officers will immediately recognize, approach, and contact the mentally ill within guidelines that are tried and proven for high success of a resolution without death or serious injury—an outcome that differed 180 degrees from this incident.

(Plaintiffs' Ex. H, Katsaris Affidavit, at ¶¶D.3, 4) Plaintiffs' expert then opines that if the defendants had been properly trained to recognize the Herring situation as one potentially involving a mental health issue, they would have established a perimeter around Mr. Herring's apartment, called a supervisor for assistance with assessment, and communicated with Herring for as long as necessary to try to calm him down, instead of immediately breaking in the door of Herring's apartment which caused Herring to feel threatened, and then spraying him with mace, which escalated the need for force. *Id.* at ¶¶D.5, 6.

The Tenth Circuit's most recent pronouncements on what evidence a plaintiff must produce to satisfy the third and fourth elements for municipal liability under §1983 are set forth in *Allen*, *Brown v. Gray*, 227 F.3d 1278 (10th Cir. 2000), *Carr v. Castle*, and *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002).

In *Allen v. Muskogee, Okla.*, the Tenth Circuit reversed the district court's order granting summary judgment to police officers and the municipality in an excessive force case. The court first concluded that a police officer may have recklessly and unreasonably created the need to use deadly force against an armed and suicidal individual based on evidence that the officer ran up to the individual's truck, shouted at him to get out, and attempted to seize the individual's gun, and the individual responded by pointing his gun at police officers, causing the officers to shoot him dead. 119 F.3d at 839, 841. The Tenth Circuit also reversed the grant of summary judgment in favor of the municipality on the plaintiff's failure to train claim. The court concluded that the municipality had demonstrated deliberate indifference to the rights of persons with whom the police come in contact by affirmatively training its police officers to leave cover and approach armed suicidal persons to try to disarm them, where the plaintiff's expert testified at length that such training was contrary to all authorities on police tactics and procedures who were in agreement that it is inappropriate to leave cover and approach a suicidal and armed individual person to attempt to take a gun away. *Id.* at 842-43. The court stated:

> When viewed in light most favorable to the plaintiff, the record contains evidence that the officers were trained to act recklessly in a manner that created a high risk of death. The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of

> the City could reasonably be said to have been deliberately indifferent to the need.

Id. at 844. The court in *Allen*, also held, under the fourth factor, that there was a direct causal link between the affirmative training the officers received and the constitutional violation based on expert evidence that approaching an armed, emotionally disturbed person and trying to get his gun recklessly created a high risk of death for officers, the armed individual and other civilians. *Id.* at 844.

Unlike the circumstances in *Allen*, there is no evidence here that the City actually trained its police officers to act in a manner contrary to recognized police procedures when interacting with the mentally ill, nor is there any evidence that defendants were trained to effect warrantless entries of individual's homes in the absence of exigent circumstances,[17] or to use objectively unreasonable force against persons with whom they come in contact. The only evidence on this point is Carroll's testimony that he was trained to use mace as a method of subduing an aggressive person and that he did not receive training specifically about the use of mace on someone exhibiting signs of mental illness. However, there is no evidence that the City made a conscious decision to instruct officers to use mace on the mentally ill. Instead, the City failed to caution officers about the potential adverse effects of mace on the mentally ill. And, although plaintiff's expert states that defendants ignored the research on the use of mace with

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[17] Chief of Police Velez testified that police officers are trained to enter an individual's home without a warrant only when exigent circumstances are present. (Velez Deposition, at 119-20)

mentally ill people, he does not opine that the use of mace presents serious safety risks.

In *Brown v. Gray*, 227 F.3d 1278 (10th Cir. 2000), the Tenth Circuit affirmed the district court's denial of summary judgment on the plaintiff's failure to train claim against the City and County of Denver based on an incident when an off-duty police officer pulled over a motorist after they became involved in a traffic dispute. *Id.* at 1284. According to the plaintiff, the officer approached the plaintiff's vehicle and pointed his gun in plaintiff's face; plaintiff responded by putting his hands up and stating "what the hell do you want? I don't have a damn thing;" and then plaintiff put his vehicle into gear and started to drive away, at which point the officer fired several shots into the car, badly injuring the plaintiff. *Id.* Plaintiff claimed that Denver's training with respect to its always armed/always on duty policy was inadequate. *Id.* at 1286. The Tenth Circuit agreed, holding that the City's policy was inadequate and that the inadequacy demonstrated Denver's deliberate indifference, as determined from the testimony of a police policy expert, a police captain, and the defendant police officer. *Id.* at 1290. Plaintiff's police policy expert testified that the always armed/always on duty policy presented serious safety risks and that if a police department adopted such a policy, it must train its officers on how to take police action in the different circumstances presented when the officers are off-shift because it was foreseeable that the lack of training would create a dangerous situation in which a shooting would occur. *Id.* at 1287, 1290. The police department captain testified that the department made a conscious decision not to distinguish between off-duty and on-duty scenarios in the training program because they are considered to be the same. *Id.*

at 1287, 1289. The captain acknowledged, however, that implementation of the policy had proved to be fatal for some officers. *Id.* at 1289. The defendant police officer testified that he felt ill-equipped to handle the encounter with the plaintiff because he did not have his uniform, patrol car, or radio and had not received any training in handling such a situation when he was off duty. *Id.* Under the fourth factor, the Tenth Circuit found that there was a direct causal link between the use of excessive force against the plaintiff and the inadequate training based on the police officer's testimony that he was attempting to make a lawful arrest pursuant to the always armed/always on duty policy when he shot the plaintiff. *Id.* at 1291.

Unlike the circumstances in *Brown*, there is no specific evidence here demonstrating that the City made a conscious decision to train police officers to respond to calls involving mentally ill persons in the same manner as they would respond to calls involving suspected criminal activity, which, according to plaintiff's expert, would be contrary to recognized police procedures. (Plaintiffs' Ex. H, at ¶¶D.4-6); *see, also, Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001) (stating that the tactics employed against "an unarmed emotionally distraught individual who is creating a disturbance" are ordinarily different from those involved in police efforts "to subdue an armed and dangerous criminal" and recognizing that increasing the use of force in the former instance may exacerbate the situation); Michael Avery, *"Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People,"* 34 Colum. Hum. Rts. Law Rev. 261 (Spring 2003) (discussion of criminal justice

authorities recognizing that police should not engage in threatening behavior with an emotionally disturbed person because fear of the police is likely to trigger a violent or aggressive response).

In *Carr v. Castle*, the Tenth Circuit rejected the plaintiff's claim that the City's inadequate training in the use of excessive force constituted deliberate indifference to the rights of others and caused the death of Mr. Carr. Police officers shot Mr. Carr multiple times in the back after Mr. Carr threw some pieces of concrete at them that barely grazed one of the officers. The Tenth Circuit found that the plaintiff did not provide any evidence that the City made a deliberate choice regarding any training; instead, the plaintiff merely enumerated the many ways in which he contended the training was inadequate. 337 F.3d at 1229. The court distinguished *Allen* and *Brown* on the ground that those cases involved deliberate training choices that were likely to lead to a constitutional violation whereas in *Carr*, the plaintiff relied on the absence of specific training that could have helped the officers during their encounter with the plaintiff. *Id.* at 1229-30. The court also found that plaintiff had failed to satisfy the causation element for municipal liability because none of the alleged inadequacies in police training led directly to the use of excessive force against the decedent. *Id.* at 1231. The Tenth Circuit reasoned that the plaintiff's failure to show that police officers were actually trained to do the wrong thing was fatal to the plaintiff's ability to establish causation for municipal liability. *Id.* at 1231-32. The court further concluded that even if some inadequacy in training had been shown, the officers were not trained by the municipality to shoot a suspect in the back after he no longer posed a threat. *Id.* at 1232.

The *Carr* decision thus appears to foreclose any basis for municipal liability under §1983 on a failure to train theory unless the plaintiff can show that police officers were specifically trained to act in a manner contrary to recognized police procedures and where such training is substantially likely to result in a constitutional violation.[18]

In *Olsen*, the Tenth Circuit reversed the district court's order granting summary judgment to Davis County on the plaintiff's failure to train claim. The failure to train claim arose from a single incident where the plaintiff-arrestee, who suffered from obsessive-compulsive disorder ("OCD"), had a panic attack en route to the jail. 312 F.3d at 1310. After arriving at the jail, plaintiff indicated on a medical pre-screening sheet, and told the pre-booking officers, that he had OCD and required medication to ward off panic attacks. *Id.* The pre-booking officers erroneously noted on the prescreening sheet that plaintiff had "CDC", took plaintiff's medication away from him, and insisted that he remove his shoes and socks, pursuant to standard search procedures. *Id.* Plaintiff complied, but suffered another panic attack based on a fear of contamination from the dirty floor. *Id.* Davis County did not provide any training for handling individuals diagnosed with OCD. *Id.* Instead, while the County's booking procedures required screening arrestees for undefined mental illnesses or psychiatric disorders, the County allowed "health trained correctional deputies" to use their discretion in dealing with mental disorders. *Id.* Plaintiff claimed that Davis County failed to train the jail's pre-

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[18] I note, however, that the *Carr* court did not discuss or distinguish *Olsen v. Layton Hills Mall*, another Tenth Circuit decision which was decided after *Allen* and *Brown*.

booking officers to recognize OCD and to handle individuals with OCD appropriately. *Id.* at 1319.

The *Olsen* court held that evidence that the pre-booking officers received no training on OCD, that OCD occurs in more than two percent of the population, and the "pre-booking officers' apparent ignorance to [plaintiff's] requests for medication," suggested that a violation of federal rights was a "plainly obvious" consequence of the County's failure to train and was sufficient to demonstrate the existence of a material factual issue about whether the County was deliberately indifferent because of its failure to train pre-booking officers about people with OCD. *Id.* at 1320 (internal quotations omitted). The court reasoned that the evidence that OCD is relatively common and that the County had procedures in place for dealing with inmates with psychiatric disorders "suggest[s] that the municipality may have had constructive notice of the illness' prevalence and consequences." *Id.* at 1320. The court also found that genuine issues of material fact existed about whether the County's inadequate training caused plaintiff to suffer another panic attack during the pre-booking process. *Id.* at 1320.

In light of *Olsen*, plaintiff's evidence here indicates that police training on officer interactions with the mentally ill was inadequate; that police contact with the mentally ill is a usual and recurring situation; and, the expert's testimony shows that the failure to provide adequate training is likely to result in situations where officers perceive a need to use force against mentally ill persons which can result in injury or death. Further, Chief Velez's testimony that the City has adopted policies for dealing with the mentally ill, and that officers who do not receive

appropriate training regarding contact with "persons with disabilities" may cause harm to such persons (Velez Deposition, at 66-67, 135) is evidence that the City had constructive notice that the alleged failure to train was likely to result in a constitutional violation. This evidence is arguably sufficient under *Olsen*, although not under *Carr*, to support a finding that the lack of adequate training in police officer interactions with the mentally ill reflects deliberate indifference to an obvious risk that violation of mentally ill individuals' Fourth Amendment rights will occur.

Even if the plaintiff Estate has met its evidentiary burden under the first three elements of municipal liability under §1983, however, its failure to train claim founders on the fourth element. Defendant Darress testified in his deposition that the City did not train him to use the pressure technique that he applied to Mr. Herring's neck that resulted in Mr. Herring's death. (Darress Deposition, at 63) Accordingly, although Darress may not have been trained to know exactly how to react to an emotionally disturbed individual in the circumstances Darress confronted, the evidence establishes that Darress was not trained by the City to apply the technique that, according to plaintiffs' expert, caused Mr. Herring's death.[19] *See*, *Carr*, 337 F.3d at 1232. Moreover, although Officer Carroll's act in spraying Mr. Herring with mace created the need for defendants to use

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[19] Darress also testified that he did not receive any training about different methods of contacting a "suspect's" neck that may cause a risk of serious injury or death. However, the plaintiff Estate does not claim that the City's training program on the use of force generally is inadequate, and the evidence of record is insufficient to support such an inference.

force against Mr. Herring, Officer Darress' application of thumb pressure to Mr. Herring's neck was the intervening act that caused Mr. Herring's death. *See Olsen*, 312 F.3d at 1318 (recognizing that causation element for municipal liability in a failure to train claim asks: "'[w]ould the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?'") (quoting *City of Canton*, 489 U.S. at 391).

Accordingly, the City of Colorado Springs is entitled to summary judgment on the Plaintiff's Estate's claim of inadequate police training.

D. Substantive Due Process claim

The plaintiff Estate's final claim is that the defendants deprived Mr. Herring of his life without substantive due process. Plaintiff alleges that defendants' actions in causing the need to use force, which turned deadly, against an unarmed man who was alone inside his apartment, communicating with Officer Darress, and who posed no threat to the police until they kicked in his door, was shocking to the conscience.

Plaintiff cannot, however, maintain a due process claim based on the same facts that support the excessive force claim. In *Graham*, 490 U.S. at 395, the Supreme Court held that "*all* claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (Emphases in original)).

As discussed in footnote 12, *supra*, to the extent that Officer Carroll's use of OC spray against Mr.

Herring was unrelated to police efforts to accomplish a "seizure" of the decedent, that claim is not actionable under the Fourth Amendment, but may be analyzed under the substantive due process clause. *See Harrington*, 268 F.3d at 1191 (internal citations omitted)

To prove a violation of Mr. Herring's Fourteenth Amendment substantive due process rights, the Estate must establish that Officer Carroll's conduct was "conscious-shocking." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-848 (1998). I find, as a matter of law, that defendant Carroll's deployment of a single burst of mace against Mr. Herring, at a distance of three to four feet, does not rise to the level of conscious shocking conduct necessary to trigger substantive due process protections. Moreover, there is no evidence that Mr. Herring suffered any injury as a result, and mace has not been shown to permanently harm the recipient. *See McCormich v. City of Ft. Lauderdale*, 333 F.3d 1234, 1245 (11th Cir. 2003) (citations omitted).

Accordingly, I grant summary judgment in favor of the defendants on the plaintiff Estate's Fourteenth Amendment substantive due process claim.

E. Deprivation of Familial Association

Mr. Herring's three minor children claim that the defendant police officers deprived them of their constitutional right to familial association by causing Herring's death.

Children enjoy a right of familial association with their parents which is included in the substantive due process right of freedom of intimate association, and which is "consonant with the right of privacy." *J.B. v. Washington Cnty*, 127 F.3d 919, 927 (10th Cir.

1997) (internal quotations and citation omitted). To establish a deprivation of their constitutional right to familial association, the plaintiffs must show that the defendant officers intended to interfere with the children's relationship with Mr. Herring at the time the officers caused his death. *Trujillo v. Bd. of Cnty. Comm's of Santa Fe Cnty.*, 768 F.2d 1186, 1190 (10th Cir. 1985). In other words, the defendants' conduct must have been directed at the children's relationship with their father, with knowledge that the conduct would adversely affect that relationship. *Id.*; *J.B.*, 127 F.3d at 927.

Plaintiff children concede that they are unable to show that the defendants intended to interfere with their relationship with their father when the defendants used force against Mr. Herring. Plaintiffs argue, however, that Tenth Circuit law should be extended to allow for liability based on reckless conduct. Plaintiffs maintain that all defendants knew that Mr. Herring had children and that the application of force against Mr. Herring in any disabling manner would impact those children.

Chief Judge Babcock rejected the same argument in *Hill v. Martinez*, 87 F.Supp.2d 1115, 1119 (D.Colo. 2000). In *Hill*, the court noted that although the Tenth Circuit has determined since *Trujillo* that some §1983 claims can be based on reckless behavior by state actors, *see, e.g. Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990)(assuming that reckless conduct could form the basis for a due process violation under §1983), the Tenth Circuit reaffirmed in *J.B.*, 127 F.3d at 927, that plaintiffs in a familial association case must show that a state actor "directed" his or her challenged conduct or statement "at the intimate relationship with knowledge that the

statements or conduct will adversely affect that relationship" (internal quotations and citation omitted). *Hill*, 87 F.Supp.2d at 1119. Chief Judge Babcock found the language in *J.B.* "to maintain *Trujillo's* intent requirement." *Id.* I find Chief Judge Babcock's decision in *Hill* persuasive.

Moreover, in *Christianson v. City of Tulsa*, 332 F.3d 1270, 1284 (10th Cir. 2003), the Tenth Circuit dismissed the plaintiffs' familial association claim because plaintiffs had failed to allege "an intent to interfere with a particular relationship protected by the freedom of intimate association," as required by *Trujillo*.

Because the Tenth Circuit has not expressly or impliedly held that deprivation of the constitutional right to familial association may be based on reckless conduct, I am bound by the holding in *Trujillo*. The minor plaintiffs' claim is dismissed.

IV.

For the reasons set forth herein, it is

HEREBY ORDERED that Defendants' Motion for Summary Judgment [filed August 1, 2005] is GRANTED in substantial part and DENIED in part as follows:

(1) Plaintiff Estate's §1983 claims of unlawful warrantless entry, unconstitutional use of mace, deprivation of substantive due process, and deprivation of constitutional right to familial association against the individual defendants are DISMISSED in their entirety;

(2) Plaintiff Estate's §1983 claim against the City of Colorado Springs for inadequately training its police officers is DISMISSED;

(3) Plaintiff Estate's §1983 excessive force claim, which is based on the physical struggle between Mr. Herring and the police officers that resulted in Herring's death, is DISMISSED against defendants Carroll and Ambuehl only;

(4) Defendants' summary judgment motion is DENIED as to the plaintiff Estate's excessive force claim against defendant Darress which is based on Darress' application of pressure to Mr. Herring's neck during the physical struggle with Herring; and,

(5) Defendants Carroll, Ambuehl, the City of Colorado Springs, and the minor plaintiffs are DISMISSED from this action.

Dated February 2, 2005.

BY THE COURT:

/s/ Patricia A. Coan
PATRICIA A. COAN
United States Magistrate Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 18, 2007]

No. 06-1166
(D.C. No. 04-CV-2429-PAC-BNB)
(Colorado)

ESTATE OF GREGORY LOUIS HERRING,
by and through Susan Fort, Esq.,
Plaintiff,

GREGORY L. HERRING, JR., SUMMER HERRING, and GREGORY Q. HERRING, minor children, by and through their Guardian Ad Litem, Susan Fort, Esq.,
Plaintiffs-Appellants,

v.

CITY OF COLORADO SPRINGS, a municipal entity; GARY DARRESS, RORY CARROLL, and BRENT AMBUEHL, individually and in their capacities as Colorado Springs police officers,
Defendants-Appellees.

ORDER AND JUDGMENTS*

Before HARTZ, SEYMOUR, and McCONNELL, *Circuit Judges*.

Three minor children of the late Gregory Herring contend the district court incorrectly rejected their

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

claim for violation of their rights to familial association. We disagree and affirm.

A neighbor of Gregory Herring summoned, the police to his apartment complex after witnessing Mr. Herring banging violently on several apartment doors. The neighbor also witnessed Mr. Herring's three children running from their apartment screaming, and Mr. Herring throwing a chair through his apartment window. The Colorado Springs police arrived at the apartment, and a lengthy physical altercation followed. Mr. Herring tragically died as a result. Mr. Herring's minor offspring asserted a claim against the city and individual police officers, alleging deprivation of their constitutional right of familial association.

The district court granted defendants' motion for summary judgment. The court reasoned that plaintiffs failed to show "defendant officers intended to interfere with the children's relationship with Mr. Herring at the time the officers caused his death," aplt. app., vol. II at 339, as required by *Trujillo v. Bd. of County Commr's of Santa Fe*, 768 F.2d 1186, 1190 (10th Cir. 1985). We review the district court's grant of summary judgment *de novo*. *Graves v. Thomas*, 450 F.3d 1215, 1217 (10th Cir. 2006).

On appeal, plaintiffs assert the right of familial association derives from the Fourteenth Amendment and therefore does not require the demonstration of intent on the part of the police officers. They contend the district court should have applied a Fourteenth Amendment balancing test to determine if the familial association claim was meritorious instead of mandating a demonstration of intent. Although plaintiffs correctly assert that the familial right of association is grounded in the Fourteenth Amend-

ment concept of liberty, *see Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993) ("The freedom of intimate association is a substantive due process right, as is its subset, the familial right of association."), we nevertheless require that plaintiffs demonstrate intent on the part of defendants.

In *Trujillo*, 768 F.2d at 1190, we "conclude[d] that an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under, section 1983." In *Griffin,* we cited *Trujillo* for the principle that

> [n]ot every statement or act that *results* in an interference with the rights of intimate association is actionable. Rather, to rise to the level of a constitutional claim, the defendant must *direct* his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship.

Griffin, 983 F.2d at 1548 (emphasis in original). Similarly, in *J.B. v. Washington County*, 127 F.3d 919 (10th Cir. 1997), while recognizing the Fourteenth Amendment as the constitutional wellspring of familial association rights, *see id.* at 927, we nonetheless continued to require a showing of direction or intent by the person who allegedly interfered with the plaintiff's right to familial association. *Id.* at 927-28. As such, we concluded that because there was "no evidence that the County officials intended or directed their conduct in this matter at the familial relationship [of the plaintiffs] with knowledge that such conduct would adversely affect the relationship as required by this court . . . the County officials' conduct did not impermissibly interfere with plaintiff's right of familial association." *Id.* at 928

(brackets and quotation marks omitted). More recently, in *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir. 2003), we rejected the constitutional claims of survivors for failing to demonstrate intent.

Thus, although plaintiffs are correct that this Circuit acknowledges the Fourteenth Amendment roots of their constitutional claim, our subsequent cases clearly preserve direction and intent as a requirement for stating a cause of action for the violation of the constitutional right to familial association. Plaintiffs have not alleged, nor do they attempt to demonstrate, that the officers directed their conduct at plaintiffs' familial association with their father or intended to interfere with it. Because they have not made the requisite showing, the district court correctly granted summary Judgment for defendants.

Accordingly, we AFFIRM.

ENTERED FOR THE COURT

Stephanie K. Seymour
Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-1166

ESTATE OF GREGORY LOUIS HERRING,
by and through Susan Fort, Esq.,
Plaintiff,

GREGORY L. HERRING, JR., SUMMER HERRING, and GREGORY Q. HERRING, minor children, by and through their Guardian Ad Litem, Susan Fort, Esq.,
Plaintiffs-Appellants,

v.

CITY OF COLORADO SPRINGS, a municipal entity; GARY DARRESS, RORY CARROLL, and BRENT AMBUEHL, individually and in their capacities as Colorado Springs police officers,
Defendants-Appellees.

ORDER

Filed July 12, 2007

Before, HARTZ, SEYMOUR and McCONNELL, *Circuit Judges*.

Plaintiff-Appellant's petition for rehearing is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed 8/01/2005]

Civil Action No. 04-CV-2429-BNB-PC

THE ESTATE OF GREGORY LOUIS HERRING,
by and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, the City of Colorado Springs ("City"), Luis Velez ("Chief Velez"), Gary Darress, Rory Carroll and Brent Ambuehl, by and through the Office of the City. Attorney, and pursuant to Fed.R.Civ.P. 56 hereby submit the following motion for summary judgment:

1. Plaintiffs filed the present complaint against the Defendants for an incident involving the death of Gregory Herring ("Herring") which occurred on May 2, 2003. The case was subsequently removed to the United States District Court for the District of Colorado.

2. In Plaintiffs' fifth claim for relief they allege that the Officers violated Herring's Fourth Amend-

ment rights by entering Herring's apartment when they had been denied entry, had no warrant, had not attempted to obtain a warrant, and had no probable cause to believe exigent circumstances existed. Police officers may make a warrantless entry when they reasonably believe that a person within is in need of immediate a*Id.* Said emergency situation falls within the exigent circumstances exception to the warrant requirement. *See Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *United States v. Wicks*, 995 F.2d 964 (10th Cir. 1993). In the present case, the Officers reasonably believed that individuals within the apartment were in danger and in need of immediate a*Id.* Therefore, the Officers are entitled to qualified immunity.

3. In Plaintiffs' sixth claim for relief they claim that the Officers' use of force was unreasonable. An officer is entitled to use force in self-defense when threatened with physical harm. *See Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *Romero v. Board of County Com'rs*, 60 F.3d 702 (10th Cir. 1995). In the present case, Herring became aggressive, attacked an Officer, and continually fought with the Officers. The Officers used a reasonable amount of force to defend themselves, and to restrain Herring. As such, the Officers are entitled to qualified immunity. *See Caricofe v. Mayor and City Council of Ocean City, Maryland*, 32 Fed.Appx. 62 (4th Cir. 2002).

4. In Plaintiffs' first claim for relief they allege that the City failed to properly train or supervise its employees regarding contact and interaction with the mentally ill, and said failure constituted a custom, practice or policy of the City. Liability does not attach to a municipality for the acts of an employee pursu-

ant to § 1983 unless the employee committed a constitutional violation, and a municipal policy or custom was the moving force behind the constitutional deprivation. *See Monelll v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Meyers v. Oklahoma County Bd. Of County Com'rs*, 151 F.3d 1313 (10th Cir. 1998). In the present case, the Officers acted reasonably and therefore committed no constitutional violation. In addition, there has been no showing of any obvious need for more Shane/Herring/pleadings/motion for summary judgment training, such that the absence of that training can be said to reflect a deliberate indifference on the part of the City. *See City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Jenkins v. Wood*, 81 F.3d 988 (10th Cir. 1996). As such, the City is not subject to liability.

5. In Plaintiffs' claims for relief one and seven, Plaintiffs allege that Chief Velez was personally responsible for implementing customs, practices and policies, and Chief Velez failed to properly train and supervise employees. Plaintiffs do not allege that Chief Velez personally participated in the subject incident. Individual liability under §1983 must be based on personal involvement in the alleged constitutional violation. A defendant may not be held liable under § 1983 on a theory of respondent superior. Further, a defendant may not be held liable merely because of his supervisory position. *See Foote v. Spiegel*, 118 F.3d 1416 (10th Cir. 1997); *Ledbetter v. City of Topeka, Kansas*, 318 F.3d 1183 (10th Cir. 2003); *Ledbetter v. Board of County Com'rs of the County of Shawnee, Kansas*, 2001 WL 705806 (D.Kan.). Since Plaintiffs have failed to allege any personal participation by Chief Velez in the subject

incident, Chief Velez should be dismissed in his individual capacity.

6. Plaintiffs also allege that Chief Velez is liable in his official capacity for implementing customs, practices and policies, and for failing to train and supervise employees. Plaintiffs' allege the same claims against the City. Naming Chief Velez in his official capacity and the City is redundant. Where a suit contains both entity and official capacity claims, the only defendant is the entity. *See Davoll v. Webb*, 943 F.Supp. 1289 (D.Colo. 1996). As such, the claims against Chief Velez in his official capacity should be dismissed.

7. In Plaintiffs' second and fourth claims for relief they allege state tort claims of negligence and intentional infliction of emotional distress. Pursuant to the Colorado Governmental Immunity Act, immunity has not been waived for these torts. Therefore, these claims should be dismissed.

8. In Plaintiffs third, fourth and tenth claims for relief, they allege that the Officers' conduct was such that it rose to the level of willful and wanton and conscience shocking, and that the Officers' intentionally inflicted emotional distress. Based upon the undisputed facts of this case, the Officers' conduct was reasonable and did not remotely approach conduct necessary to support willful and wanton, conscience shocking, or intentional infliction of emotional distress claims. *See Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); *Drake v. City and County of Denver*, 953 F.Supp. 1150 (D.Colo. 1997), *aff'd* 161 F.3d 17 (10th Cir. 1998); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). Further, Herring's children were not present during the interaction between the Officers and Herring. Therefore, the children were not in the zone

of danger. *See Atsepoyi v. Tandy Corp.*, 51 F.Supp.2d 1120 (D.Colo. 1999): As such, these claims cannot stand.

9. In Plaintiffs' eighth claim for relief they allege that the Officers violated their constitutional right to familial association. An allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under §1983. *See Trujillo v. Board of County Com'rs of Santa Fe County*, 768 F.2d 1186 (10th Cir. 1985). Plaintiffs have failed to allege that the Officers intended to interfere with a relationship, nor do the facts support such an allegation. As such, said claim should be dismissed.

10. Plaintiffs are not entitled to punitive or exemplary damages against the City or Chief Velez in his official capacity. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

11. There are no genuine issues of material fact on these points.

12. Therefore, the Defendants are entitled to dismissal against Plaintiffs in this case.

13. The Brief in Support of Motion for Summary Judgment is submitted herewith along with supporting affidavits and copies of cited unpublished opinions.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Honorable Court enter an order granting Defendants' Motion for Summary Judgment, and dismiss Plaintiffs' complaint with prejudice, and for any other relief this Court deems appropriate.

Dated this 1st day of August, 2005.

Respectfully submitted,

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Case Number: 1:04-cv-2429

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Luis Velez
Luis (I) Velez
Gary (I) Darress
Gary Darress
Rory (I) Carroll
Rory Carroll
Brent (I) Ambuehl
Brent Ambuehl

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-CV-2429-BNB-PC

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, the City of Colorado Springs ("City"), Luis Velez ("ChiefVelez"), Gary Darress, Rory Carroll, and Brent Ambuehl, by and through the Office of the City Attorney, and pursuant to Fed.R.Civ.P. 56 hereby submit the following brief in support of motion for summary judgment:

STATEMENT OF FACTS

On May 2, 2003, Scott Elder made a call to 911 to report a disturbance being caused by Gregory Herring ("Herring") at the Winfield Apartments. Exhibit A, Affidavit of Scott Elder, ¶2. Mr. Elder heard a banging noise coming from outside of his apartment. *Id.* at ¶4. When Mr. Elder looked out he saw Herring banging on other apartment doors. *Id.* Mr. Elder then observed Herring cross the parking lot and approach Mr. Elder's apartment building. *Id.* Mr. Elder then

heard Herring banging on doors beneath his apartment, stomp up the stairs and begin to violently pound on Mr. Elder's door. *Id.* at ¶¶4-5. Perceiving Herring to be over six feet tall and approximately 240 pounds, Mr. Elder feared that Herring would break open the door and harm Mr. Elder. *Id.* at ¶¶5-7. Fearing for his own safety, Mr. Elder retreated to his balcony and called 911. *Id.* at 7. It was Mr. Elder's intention to jump from his balcony if Herring broke into the apartment. *Id.* at ¶7.

While Mr. Elder was speaking with the 911 operator, Herring left Mr. Elder's door and went to Herring's own apartment. *Id.* at ¶8. Mr. Elder then watched as Herring's three children ran screaming from Herring's apartment. *Id.* Mr. Elder also observed Herring throwing a chair out of Herring's apartment window. *Id.* Mr. Elder reported this information to the 911 operator and ended the call. *Id.* at ¶9.

A short time later, Mr. Elder called back to 911. *Id.* at ¶10. Mr. Elder reported that Herring was breaking out his apartment windows and throwing items out of the windows. *Id.* at ¶11. Mr. Elder also reported that Herring was nude, his arms were slashed and bleeding, and he had a cut on his abdomen. *Id.* at ¶12.

Mr. Elder ended this call to 911 and then observed a fire engine from the Colorado Springs Fire Department ("CSFD") and an ambulance from American Medical Response ("AMR") arrive and park in the apartment complex parking lot. *Id.* at ¶14; Exhibit E, Affidavit of Firefighter/Paramedic Clark Gaddie, ¶3; Exhibit F, Affidavit of Firefighter Lerry Armstead, ¶3.

Colorado Springs Police Officers Gary Darress, Rory Carroll and Brent Ambuehl were dispatched to respond to Mr. Elder's calls. While enroute to the Winfield Apartments, Officer Darress was informed that Herring had been beating on a neighbor's door, that Herring was naked, bleeding from cuts on his arm and abdomen, and was throwing items out of Herring's own apartment window. Affidavit B, Affidavit of Officer Gary Darress, ¶3. Upon arrival at the Winfield Apartments, Mr. Elder directed Officer Darress to Herring's apartment. Exhibit A, ¶¶14-15; Exhibit B, ¶5.

Upon approaching Herring's apartment, Officer Darress observed a broken window and numerous household items that had been thrown out of the broken window. Exhibit B, ¶6. Officer Darress then looked through the broken window and into the apartment. Officer Darress observed blood on the walls, items that had been thrown all over the apartment, and that the inside, of the apartment looked "like a bomb had gone off." *Id.* at ¶7. Officer Darress then heard a grunting or moaning noise coming from inside the apartment. *Id.* at ¶9. At this time, Mr. Elder yelled to .Officer Darress something about Herring's children. *Id.* at ¶10. Officer Darress then walked around the outside of Herring's apartment and observed that every window in the apartment had been broken out, and there was blood throughout the other rooms in the apartment. *Id.* at ¶11. Officer Darress then contacted Herring through a broken window in the back of the apartment by introducing himself. Officer Darress observed that Herring was naked, had a two-and-one-half to three inch cut on his right arm, had a cut on his abdomen, and was leaning out of a broken window with his abdomen pressed against the broken glass in the window

frame. *Id.* at ¶¶12-14. When Officer Darress contacted Herring, Herring continued to throw items out of the window. *Id.* at ¶13. Because of the cuts on Herring, Officer Darress thought that Herring was intentionally injuring himself, and possibly attempting to commit suicide. *Id.* at ¶14.

While Officer Darress was contacting Herring, Officers Rory Carroll and Brent Ambuehl arrived at the Winfield Apartments. Officer Carroll had been informed that Herring had been banging on an apartment door and trying to get inside the apartment, that Herring was nude, was banging on other apartment doors, that children had run from Herring's apartment, that furniture and clothing were being thrown from Herring's apartment, and that Herring was tearing up his own apartment. Exhibit C, Affidavit of Officer Rory Carroll, ¶3. Officer Ambuehl was informed that Herring had cuts on his arms and abdomen, was banging on apartment doors, and that children were living with Herring. Exhibit D, Affidavit of Officer Brent Ambuehl, ¶3.

When Officers Carroll and Ambuehl arrived at the Winfield Apartments, Officer Carroll observed blood on one or two apartment doors. Exhibit C, ¶5. At this time, Mr. Elder also directed Officers Carroll and Ambuelil to Herring's apartment. Exhibit A, ¶16; Exhibit C, ¶5.

Upon arriving at Herring's apartment, Officers Carroll and Ambuehl observed that every window in Herring's apartment had been broken out, Herring was throwing items out of a broken window, Herring was yelling, children's clothes, furniture, etc., had been thrown out of the apartment, and broken glass was everywhere. Exhibit C, ¶6; Exhibit D, ¶7. In addition, Officer Ambuehl observed that Herring was

naked, bleeding, and appeared to be harming himself. This was evident because of the blood all over Herring's abdomen and body, and the blood on the sidewalk. Exhibit D, ¶8. Officers Carroll and Ambuehl observed Officer Darress speaking with Herring and trying to calm Herring down. Exhibit C, ¶6; Exhibit D, ¶7.

At this time, Officer Darress believed that Officers Carroll and Ambuehl could gain entry into Herring's apartment while Officer Darress distracted Herring. Exhibit B, ¶15. It was Officer Darress' intent that Officers Carroll and Ambuehl subdue Herring so that Herring would not continue to harm himself, so that medical attention could be administered to Herring, and to keep Herring from jumping out the broken window and further harming himself or others. *Id.* at ¶15 and 43. It was Officer Darress' opinion at the scene that Herring needed immediate help. *Id.* at ¶43.

Officer Darress then directed Officers Carroll and Ambuehl to go in the front door of the apartment. Exhibit B, ¶16; Exhibit C, ¶7, Exhibit D, ¶10. Officer Ambuehl went to the front door while Officer Carroll waited at the corner of the apartment building. Exhibit C, ¶7; Exhibit D, ¶10. The front door was locked, so Officers Carroll and Ambuehl returned and conveyed this to Officer Darress. Officer Darress then directed Officers Carroll and Ambuehl to kick in the front door. Exhibit B, ¶16; Exhibit C, ¶7, Exhibit D, ¶10. Officers Carroll and Ambuehl then kicked in the front door and entered the apartment. Exhibit C, ¶8; Exhibit D, ¶11.

Officer Carroll did not know if anyone else was in the apartment with Herring that may have been in danger and needing help. Officer Carroll heard that

kids had run from the apartment, but did not know if anyone was still in the apartment. Exhibit C, ¶31. It was Officer Carroll's opinion at the scene that if anyone else was in the apartment they would have been in danger and in need of immediate help. *Id.* at ¶32. Given all the blood that Officer Carroll observed, Officer Carroll did not know if it was all from Herring or from someone else as well. *Id.*

Officer Ambuehl had been informed that Herring had children but did not know if the children were in the apartment with Herring. Exhibit D, ¶34. Officer Ambuehl entered Herring's apartment to help any children who may have been present. It was Officer Ambuehl's opinion at the scene that if any children were in the apartment they would have been in danger and in need of immediate help. *Id.* at ¶35.

Upon entering the apartment, Officers Carroll and Ambuehl observed that the apartment was in shambles. Various items had been thrown everywhere and the Officers had to maneuver over the items to get through the apartment. Exhibit C, ¶9. Officer Carroll went directly to the back bedroom where Herring was located while Officer Ambuehl checked the remainder of the apartment. Exhibit C, ¶10; Exhibit D, ¶¶12-13. Herring was the only person in the apartment. Exhibit D, ¶13.

To get to the back bedroom where Herring was located Officer Carroll had to go through a hallway which led to the bedroom and bathroom. Exhibit C, ¶10. Officer Carroll entered the bedroom and stopped by the entrance to the bathroom. *Id.* Officer Carroll observed that the bathroom floor was covered with water and blood, that Herring was naked, had blood all over his arm and abdomen, and there was blood all over the apartment walls. *Id.*

When Officer Carroll entered the bedroom Herring saw him. Herring then threw a broken shelf and a bottle at Officer Carroll. Exhibit C, ¶11. At this time, Officer Ambuehl had made his way to the bedroom. Officer Ambuehl positioned himself at the doorway between the hall and the bedroom. Exhibit D, ¶14. Herring then approached Officer Carroll at which time Officer Carroll ordered Herring to stop. Exhibit C, ¶11. Herring continued to approach Officer Carroll at which time Officer Carroll sprayed Herring one time with a one second burst of O.C. spray in Herring's left eye. Exhibit B, ¶17; Exhibit C, ¶11; Exhibit D, ¶15. Herring was sprayed because of his aggressive behavior and because he would not stop. Exhibit C, ¶11. In response to the O.C. spray, Herring covered his eyes, turned away for one second, looked back at Officer Carroll, stated that "we are all going to die," and charged into Officer Carroll. Exhibit B, ¶18; Exhibit C, ¶12; Exhibit D, ¶15.

Believing that Herring meant what he said, Officer Carroll again ordered Herring to stop. Herring did not stop and attacked Officer Carroll. Exhibit B, ¶18; Exhibit C, ¶¶13-14; Exhibit D, ¶15. Herring grabbed Officer Carroll by the left shoulder and pushed him back causing the door between the hall and bedroom to slam shut. Herring and Officer Carroll then fell to the bathroom floor. Exhibit C, ¶14; Exhibit D, ¶15.

At this time, Officer Carroll was alone with Herring in the bathroom. Exhibit C, ¶14. Herring then grabbed Officer Carroll's testicles and squeezed. *Id.* at ¶14. Screaming in pain Officer Carroll struck Herring with his fist in the middle of Herring's back and ordered Herring to let go of his testicles. *Id.* Herring did not let go so Officer Carroll struck Herring again with his fist on Herring's back. *Id.*

Herring then let go and tried to get up. *Id.* Herring again stated, "we are all going to die." *Id.*

During this t[illegible], Officer Ambuehl was able to force open the door to [illegible]e bedroom. Exhibit D, ¶15. Officer Ambuehl observed that the toilet, door and bathtub had blood all over them, and the bathroom floor was wet and bloody. Exhibit D, ¶17. Officer Ambuehl then grabbed Herring's feet to assist Officer Carroll. *Id.* at ¶18. Herring was fighting so hard that he was throwing Officers Carroll and Ambuehl around the bathroom. *Id.* at ¶19.

Officer Darress came around the apartment and entered the apartment through the front door. Exhibit B, ¶19. Upon entering the apartment Officer Darress saw a blanket. Officer Darress grabbed the blanket with the intent of wrapping it around Herring to subdue him. Exhibit B, ¶19. Officer Darress then entered the bathroom and attempted to wrap the blanket around Herring. This did not work and the blanket went flying off into the bathtub. Exhibit B, ¶23; Exhibit D, ¶20. At this time, Herring was face down on the bathroom floor. Officer Darress was on Herring's right side by Timing's head and shoulders, Officer Carroll was on Herring's left side by Herring's head and shoulders, and Officer Ambuehl was at Herring's feet. Exhibit B at ¶¶22-23; Exhibit C at ¶16.

All three Officers were now struggling with Herring and trying to restrain him. Exhibit C, ¶17. Herring's left heel then came up and kicked Officer Ambuehl in the left eye. Exhibit D, ¶21. Officer Carroll then struck Herring on Herring's shoulder with his fist. Exhibit C, ¶17. Officer Darress took out his handcuffs and handed them to Officer Carroll, who was able to get Herring's left wrist cuffed. Exhibit 13, ¶24; Ex-

hibit C, ¶17. However, due to Herring fighting so hard Officer Carroll was unable to get the cuffs around Herring's right wrist. Exhibit B, ¶24. Herring was fighting so hard that he was physically lifting the Officers off of the floor. *Id.*

During the struggle, Herring grabbed Officer Carroll's firearm holster. This led Officer Carroll to believe that Herring was reaching for his gun. Exhibit C, ¶18. Herring then grabbed Officer Darress' testicles and squeezed. Screaming in pain, Officer Darress struck Herring with the soft side of his fist in an effort to get Herring to let go of his testicles. Exhibit B, ¶25. Herring finally let go after being struck in the head five to six times. *Id.*

Officer Carroll then tried to pull Herring's left arm behind Herring's back in an effort to control Herring's arms. Exhibit C, ¶19. However, Herring pulled Officer Carroll forward. *Id.* Officer Carroll then struck Herring on the shoulder with his fist. *Id.* At this time, Officer Carroll pulled out his PR-24 and put it under Herring's armpit and tried to pull Herring's arm back. *Id.* at ¶20; Exhibit D, ¶23. This maneuver was unsuccessful, so Officer Carroll gave the PR-24 to Officer Ambuehl to use under Herring's legs as a compliance maneuver. *Id.* This maneuver was also unsuccessful, so Officer Ambuehl placed the PR-24 on the counter by the sink. *Id.* Officer Carroll then reached over to try to get Herring's right wrist cuffed. Exhibit C, ¶21. Herring then bit into Officer Carroll's left ring finger. Exhibit B, ¶26; Exhibit C, ¶21. Screaming in pain Officer Carroll struck Herring with his fist in the side of Herring's face and ordered Herring to let go of his finger. Herring did not let go, so Officer Carroll struck Herring again. Herring then

let go of Officer Carroll's finger. Exhibit B, ¶26; Exhibit C, ¶22.

Officer Ambuehl then wedged his right knee into the side of Herring's right thigh and wedged his right leg against the wall for leverage in an attempt to restrain Herring's legs. Exhibit D, ¶24. However, this maneuver did not work. *Id.* At this time, Herring grabbed Officer Darress' PR-24 and pulled it out of the holder. Exhibit B, ¶27. Officer Darress fought Herring and was able to get the PR-24 back. *Id.* Herring continued to fight, so Officer Darress struck Herring in the. head three to four times using a flat chop. *Id.* Herring was fighting so hard that Officer Darress thought Herring was on PCP. *Id.* at ¶28. Herring then bit into Officer Darress' right knee. *Id.* at ¶29. Officer Darress struck Herring with his fist on Herring's head approximately five times, ordering Herring to stop biting his knee. *Id.*

At this time, Officer Darress called for medical personnel to come in and assist. Exhibit B, ¶30. It was Officer Darress' belief that with more bodies Herring could be controlled and then medical assistance could be administered to Herring. *Id.* Herring continued to fight so hard that he was physically lifting the Officers off of the ground. *Id.* at ¶31. At this time, Officer Darress pressed his thumb into a pressure point on the side of Herring's neck in an attempt to, get Herring to comply with commands to calm down. However, this maneuver had no effect. *Id.*

Officer Darress was then finally able to get the handcuff around Herring's light wrist so that both of Herring's hands were cuffed in front. Exhibit B, ¶32; Exhibit C, ¶23. Officer Darress again called for medical personnel to come in an assist. Exhibit B, ¶33; Exhibit D, ¶25.

Herring then pushed himself and the Officers up off the floor so that Herring was now on his forearms and his upper body was off the floor, and he tried to roll over. Exhibit B, ¶34; Exhibit C, ¶23. Officer Darress believed that if Herring were able to get up it would be impossible to contain him. Exhibit B, ¶35. At this time, Officer Darress, while lying on top of Herring, pushed with his upper body on Herring's back in an attempt to get Herring back on his stomach. *Id.* Officer Carroll also struck Herring on the back with his fist and ordered Herring to get down. Exhibit C, ¶23. Herring again reached back and grabbed Officer Carroll's firearm holster. *Id.* at ¶24. Believing Herring was attempting to take his firearm; Officer Carroll placed his hand on his firearm to keep Herring from taking the firearm. *Id.*

At this time, CSFD and AMR entered the apartment. Exhibit B, ¶36; Exhibit C, ¶25; Exhibit D, ¶26; Exhibit E, ¶8; Exhibit F, ¶6. When approaching the apartment, the Firefighters observed that blood was on the sidewalk and on other apartment doors, that the apartment windows were broken out, that debris was scattered outside of the apartment, and they could hear screaming coming from inside the apartment. Exhibit E, ¶7; Exhibit F, ¶5. Upon entering the apartment, the Firefighters observed that the apartment was in disarray, blood was everywhere, the three police Officers were fighting with Herring in the bathroom, Herring was naked, face down, yelling, cussing, and fighting the Officers. Exhibit E, ¶¶8-9; Exhibit F, ¶6. The Firefighters immediately assisted the police Officers and attempted to restrain Herring because the Officers were unsuccessful in controlling Hearing, and for Herring's own safety so that medical attention could be administered to him. Exhibit E, ¶11; Exhibit F, ¶8.

Because Herring could not be restrained, it was determined that medication should be administered to Herring. At this time, an AMR paramedic prepared a syringe of 5 milligrams of Haldol and administered the Haldol into Herring's left buttock. Exhibit B, ¶36; Exhibit C, ¶25; Exhibit D, ¶27, Exhibit E, ¶¶12-13; Exhibit F, ¶9. However, this shot had no effect on Herring. *Id.* The AMR paramedic then prepared a second 5 milligram shot of Valium and handed the syringe to Firefighter/Paramedic Gaddie. Firefighter/Paramedic Gaddie then administered the Valium into Herring's left buttock. A short time after the second shot was administered, Herring began to calm. down. Exhibit B, ¶36; Exhibit C, ¶26; Exhibit D, ¶¶28-29; Exhibit E, ¶14; Exhibit F, ¶10. The Haldol and Valium were administered to Herring in order to assist in restraining Herring so that medical care could be provided to Herring. These medications are routinely used for the safety of the subject individual, the officers, and firefighters involved. Exhibit E, ¶15.

After Herring had calmed down, Firefighter/ Paramedic Gaddie asked if Herring was breathing. Exhibit B, ¶37; Exhibit E, ¶16; Exhibit F, ¶11. Officer Darress checked Herring's pulse and confirmed that Herring was breathing. *Id.* Officers Darress, Carroll, and Ambuehl then left the bathroom and apartment to attend to their own injuries. Exhibit B, ¶38; Exhibit C, ¶27; Exhibit D, ¶30; Exhibit B, ¶17.

After the Officers left the bathroom, the CSFD and AMR personnel rolled Herring onto his back and pulled him toward the doorway. Exhibit E, ¶18. Firefighter /Paramedic Gaddie then checked Herring's breathing using a stethoscope and noted that Herring

had strong breath sounds. Firefighter/Paramedic Gaddie also discovered that Herring had a strong carotid pulse. *Id.*

A few minutes later, Herring stopped breathing. Exhibit E, ¶19. Firefighter/Paramedic Gaddie immediately checked Herring's pulse and discovered that Herring still had a strong carotid pulse. *Id.* Firefighter/Paramedic Gaddie then began ventilating Herring. *Id.*, Exhibit F, ¶¶512-13. Herring was then placed on a backboard and rushed to the AMR ambulance. *Id.* Once at the ambulance, Firefighter/Paramedic Gaddie again checked Herring's pulse. At this time, Herring did not have a pulse so CPR was immediately begun. Exhibit E, ¶19. Herring was then transported to the hospital, where he subsequently died. *Id.*

ARGUMENT

I. STANDARD OF REVIEW.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Upon a motion for summary judgment, the moving party bears the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to produce evidence creating a genuine issue of material fact to be resolved at trial. *Vitikus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993). To avoid summary judgment, the non-moving party must present more than "a mere scintilla of

evidence." *Id.* There must be enough evidence to allow a reasonable jury to find for the non-moving party. *Id.* The non-movant "may not rest upon mere allegations or denials" of the pleadings, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), but must "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Intern., Inc., v. First Affiliated Securities Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

Qualified immunity is an affirmative defense against Section 1983 claims. *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991). Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability," and to spare them the burden of going forward with trial. *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982). *See also Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In all but the most exceptional cases, qualified immunity protects government officials performing discretionary functions from the burden of civil trials and from liability for damages. *Harris v. Board of Educ. of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997).

Excessive force claims are analyzed under the Fourth Amendment's "objective reasonable standard," not under substantive due process principles. *Saucier v. Katz*, 533 U.S. 194, 204, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *See also Graham v. Conner*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). This objective standard requires the court to ask "whether a reasonable officer in the same circum-

stances would have concluded that a threat existed justifying the particular use of force." *Graham*, 490 U.S. at 396-97. "Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier*, 533 U.S. at 205 (internal citations omitted). Use of the "20/20 vision of hindsight" is not permitted. *Id.* Rather, "deference to the judgment of reasonable officers on the scene" is given. *Id.* Therefore, the qualified immunity defense "embodies an 'objective reasonableness' standard giving a government agent the benefit of the doubt," provided that the conduct was not "so obviously illegal in the light of then-existing law that only an official who was incompetent or who knowingly was violating the law would have committed" the acts. *Crosby v. Paulk*, 187 F.3d 1339, 1344 (11th Cir. 1999).

"In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." *Saucier*, 535 U.S. at 200. *See also Schnurr v. Board of County Coin of Jefferson County*, 189 F.Supp.2d 1105, 1119 (D.Colo. 2001). "After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). The plaintiff must then satisfy a "heavy two-part burden" *Id.* "The plaintiff must first establish 'that the defendant's actions violated a constitutional or statutory right.'" *Id.* "If the plaintiff establishes a violation of a constitutional or statutory right, he must then demonstrate that the

right at issue was clearly established at the time of the defendant's unlawful conduct." *Id.*

To survive a motion for summary judgment, the plaintiff must show the right was "clearly established in a 'particularized' sense." *Anderson*, 483 U.S. at 640. A plaintiff "must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). A plaintiff "must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995). *See also Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994) ("the plaintiff . . . has the burden to show with particularity facts and law establishing the inference that the defendants violated a constitutional right"). For the law to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). *See also Anderson*, 453 U.S. at 640 (a right is clearly established if the contours of the right are "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right"). One purpose of this requirement is notice; officials cannot "reasonably be expected to anticipate subsequent legal developments" nor "fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Powell v. Mikulecky*, 891 F.2d 1454, 1456 (10th Cir. 1989). In short, "the record must clearly demonstrate the plaintiff has satisfied the heavy two-part burden; otherwise the defendants are entitled to qualified

immunity." *Medina v. Cram*, 252 F.3d at 1128. "Consequently, in order for [Plaintiffs] claim to survive judgment, the record must contain facts that rebut the presumption of the officer's immunity from suit." *Id.* at 1130.

II. THE OFFICERS WERE CONFRONTED WITH AN EMERGENCY SITUATION GIVING RISE TO EXIGENT CIRCUMSTANCES. THEREFORE, THE OFFICERS WERE OBJECTIVELY REASONABLE IN ENTERING THE APARTMENT AND ARE ENTITLED TO QUALIFIED IMMUNITY.

In Plaintiffs' fifth claim for relief they assert that the Officers' violated Herring's Fourth Amendment rights by entering Herring's apartment. Complaint, ¶¶141-43. Plaintiffs' claim that the Officers had been denied entry, had no warrant, had not attempted to obtain a warrant, and had no probable cause to believe exigent circumstances existed justifying entry. *Id.* at 142.

It is not disputed that the Officers did not obtain a warrant before entering the apartment. However, "the Fourth Amendment does not bar police officers from making warrantless entries: and searches when they reasonably believe that a person within is in need of immediate aid." *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). *See also Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) ("Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others"); *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir. 1993) ("officers may . . . conduct a warrantless search if they believe that their own lives or the lives of others are at risk").

Therefore, emergency situations involving endangerment to life fall within the exigent circumstances exception to the warrant requirement. *Wicks*, 955 F.2d at 970.

The basic elements of the exigent circumstances exception are that:

> (1) the law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search must not be motivated by an intent to arrest and seize evidence, and (3) there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.

United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1986). In determining whether exigency existed, the court examines the circumstances "as they would have appeared to prudent, cautious, and trained officers." *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998). "The question is not whether one of the Plaintiffs was actually at risk or in need of aid, but whether the Defendant Officers were reasonable in believing that exigent circumstances existed." *Foutz v. City of West Valley City*, 345 F.Supp.2d 1272, 1276 (D.Utah 2004).

In the present case, the Officers had reasonable grounds to believe that there was an immediate need to protect the life of others. The Officers responded to a report by a neighbor that there was a nude male pounding on apartment doors, including the neighbor's, so hard the neighbor feared the male would break open the door, that the male was breaking out his own apartment windows, was throwing items out

of the broken window, that his arms were slashed and bleeding, that his abdomen was cut, and that children had run screaming from the male's apartment. Exhibit A, ¶¶4-12. Upon arrival, Officer Darress observed that every window in the apartment had been broken out, items had been thrown onto the ground outside, there was blood on the walls in the rooms throughout the apartment, and that the inside of the apartment looked like a bomb had gone off. Exhibit B, ¶¶6-11. Upon contacting Herring, Officer Darress observed that Herring was naked, had cuts on his aim and abdomen, and was leaning against broken glass in the window frame. *Id.* at ¶¶12-14. Upon Officer Carroll's arrival, Officer Carroll observed blood on apartment doors, Herring was throwing items out of the apartment window, the apartment windows had been broken out, and he was informed by Officer Darres that blood was everywhere. Exhibit C, ¶¶5-6 and 32. When Officer Ambuehl arrived, Officer Ambuehl observed that all the apartment windows had been broken out, Herring was throwing items out of a window, Herring was naked, bleeding and there was blood all over Herring's abdomen, body and the sidewalk. Exhibit D, ¶¶6-8.

The statements made by the neighbor regarding Herring violently beating on doors, Herring appearing to be injured, and children having ran screaming from Herring's residence coupled with the Officers' personal observations of the broken windows, debris on the ground, blood on doors, apartment walls and the sidewalk, as well as Herring's own injuries and the destroyed condition of the apartment all support the Officers' reasonable belief that someone in the apartment was in need of immediate aid, and thus exigent circumstances existed. Confronted with this

evidence, the Officers were objectively reasonable in concluding that either Herring, children, or someone else in the apartment could have been seriously injured. *See Foutz*, 345 F.Supp.2d at 1277.

The undisputed evidence reflects a concern on the part of all three Officers that someone in the apartment may have been in danger and in need of immediate aid. It was Officer Darress' opinion at the scene that Herring was injuring himself and in need of immediate help. Officer Darress' intent was to subdue Herring so that medical aid could be administered to Herring. Exhibit ¶43. Officer Carroll was concerned that someone other than Herring could have been in the apartment. It was Officer Carroll's opinion at the scene, given all the blood, that if someone else was in the apartment with Herring they would have been in danger and in need of immediate a*Id.* Exhibit ¶¶31-32. Officer Ambuehl was concerned that children may have been in the apartment with Herring. Officer Ambuehl had been informed that Herring had children and it was Officer Ambuehl's opinion that if any children were in the apartment they would have been in danger and in need of immediate aid. Exhibit D, ¶¶134-35.

The Officers were not motivated by an intent to arrest and seize evidence. Indeed, the Officers were motivated by an intent to help whomever was in the apartment and either assure their safety, or assure that medical care could be provided. *See Foutz*, 345 F.Supp.2d at 1277.

The same facts justifying the Officers' belief that there was an immediate need to protect the lives of others also provide a reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched. Based upon the undis-

puted facts, the Officers had objectively reasonable grounds to believe that an emergency situation existed justifying a warrantless entry into the apartment to provide assistance to the occupants or to assure their safety. *See Foutz,* 345 F.Supp.2d at 1277. The existence of blood, broken windows, and other signs of destruction provide probable cause for an officer's reasonable belief that an emergency exists. *See Tierney v. Davidson*, 133 F.3d 189, 198 (2nd Cir. 1998) ("The absence of blood, overturned furniture or other signs of tumult" did not render the officer's belief that danger existed unreasonable and did not require the officer "to withdraw and go about other business, or stand watch outside the premises listening for the sounds of splintering furniture"); *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry, but they are not essential").

The Officers' choice to enter the apartment was objectively reasonable. As such, the Officers are entitled to qualified immunity. "Such immunity is given not only for the protection of the officers, but also to protect victims of crime." *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999). "Permitting suit against officers who have acted reasonably when there is reason to fear would create exactly the wrong incentives. Indeed, if the officers had done nothing, and [someone] had been injured, they would have faced the threat of suit." *Id.* at 51.

III. THE OFFICERS' USE OF FORCE WAS OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES. THEREFORE, THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

In Plaintiffs' sixth claim for relief they claim that the Officers' use of force was objectively unreasonable given the totality of the circumstances existing at the time. Complaint, ¶48. As previously discussed, it was objectively reasonable for the Officers to enter the apartment fluent. The pertinent question now is whether the force used by the Officers, given the force used by Herring against the Officers, was reasonable. Applying the appropriate reasonableness standard, it cannot be held that the Officers' actions were so deficient that no reasonable officer could have acted in the same way.

After Officers Carroll and Ambuehl entered the apartment Officer Carroll proceeded to the bedroom, where Herring was located, while Officer Ambuehl checked the remainder of the apartment for other people. Exhibit C, ¶10, Exhibit D, ¶¶12-13. Upon Officer Carroll entering the bedroom, Herring became aggressive. Herring threw items at Officer Carroll and then approached Officer Carroll. Exhibit C, ¶11. After Herring would not stop as ordered, Officer Carroll sprayed Herring one time with O.C. spray. *Id.* A reasonable officer in Officer Carroll's position could have believed that Herring was threatening the officer's safety by his violent acts and failure to stop when ordered. Further, an officer may use force in self-defense when threatened with physical harm. *See Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (deadly force may be used if "officer has probable cause to believe that the suspect poses a threat of serious physical harm either to

the officer or to others"); *Romero v. Board of County Com'rs*, 60 F.3d 702, 704 (10th Cir. 1995) ("An officer's use of deadly force in self-defense is not constitutionally unreasonable"). Officer Carroll's use of force in self-defense was not deadly, and was reasonable under the circumstances.

Herring then charged and attacked Officer Carroll. Exhibit B, ¶18, Exhibit C, ¶¶12-14; Exhibit D, ¶15. At this time, the physical fight escalated and became increasingly intense.. The situation was clearly "rapidly evolving." There was no time for the Officers to reflect as Herring became increasingly violent. See *Graham,* 490 U.S. at 307 ("officer's actions are not to be assessed with 20/20 hindsight" when faced with the need to make instantaneous decisions). Officers Darress and Ambuehl then came to Officer Carroll's aid and all three Officers fought to restrain Herring. Exhibit B; Exhibit C; Exhibit D. While it is true that the Officers struck Herring, each act of force used by the Officers was in response to Herring's violent actions. Herring grabbed the Officers' testicles and squeezed, bit the Officers, reached for the Officers' PR-24 and gun, and continually tried to get up to further attack the Officers. In short, the Officers reasonably responded to Herring's attacks. *Id.*

The present case is directly on point with the case of *Caricofe v. Mayor and City Council of Ocean City, Maryland*, 32 Fed.Appx. 62 (4th Cir. 2002). *Caricofe* involved an incident where a motel desk clerk called the police to report that a large naked man was in the hallway on the seventh floor jumping around, banging himself against the walls, and banging on guestroom doors. Officer Howard arrived and observed Caricofe acting like he was "strung out on some kind of drug." Officer Howard decided that

Caricofe needed to be detained before someone got hurt, so he called for back-up. Officer Howard then attempted to engage Caricofe in conversation, but received no response.

Sergeant Braeuninger and Officer Jones soon arrived. The officers decided to subdue Caricofe because he was a danger to himself, other hotel guests and the officers, and then call for medical assistance. Officers Howard and Jones approached Caricofe and placed a handcuff on each wrist and tried to bring the cuffs together behind Caricofe's back. Caricofe threw the officers off of him, stood up, and began to swing his arms around. At this time, all of the officers sprayed Caricofe with pepper spray, but the spray had no effect. Caricofe then advanced towards the officers, and pinned Officer Howard up against the wall. Officers Jones and Howard struggled with Caricofe and Sergeant Braeuninger called for more help. The officers then began striking Caricofe with. their batons on his buttocks and legs. Caricofe then ran down the stairs, depsite the fact that Officer Jones was hitting him in the shin with the baton.

Caricofe ran into the parking lot. The officers tried to tackle Caricofe and eventually took Caricofe down to his hands and knees. At this time, other officers had arrived on scene. Pepper foam was then used on Caricofe, with no effect. Caricofe then stood up and shed four officers who were on him. Officer Townsend then began to strike Caricofe with his baton across the left thigh. Officers Skarpac and Engstron also struck Caricofe with the batons on his lower legs. Caricofe then ran away. Seveal officers then converged on Caricofe and took him to the ground. The officers struggled with Caricofe and were finally able

to handcuff him and put a violent prisoner restraining device on his legs.

Caricofe continued to struggle, so the officers held him down by leaning and kneeling on him. Eventually, Caricofe stopped moving. At this time, Officer Alban confirmed that Caricofe was breathing. However, while waiting for the paramedics to arrive, Caricofe stopped breathing. The paramedics performed CPR on Caricofe, however Caricofe died. Caricofe suffered injuries to his head, neck, torso, upper and lower extremities, and had a laceration to the top of his head.

Caricofe's parents commenced a 42 U.S.C. § 1983 action claiming that the police officers used excessive force, and that the officers were improperly trained and supervised. The court held that the officers "were faced with a situation in which a large and exceptionally strong man was acting erratically and violently, placing at risk not only himself, but also hotel guests and the police officers. The officers necessarily made a split-second judgment that the man needed to be restrained and then proceeded with this effort, escalating their force only when the previous level of force proved ineffective." *Id.* at 66-67. "This sequence of events demonstrates a reasoned and restrained approach, rather than unreasonableness. That Caricofe died after the struggle is most tragic, but it cannot be said that this was from any unreasonable conduct on the part of the officers." *Id.* at 67. (Emphasis in opinion).

In the present case, Officers Darress, Carroll, and Ambuehl were faced with a situation whereby Herring was acting violently, both within his apartment and previously outside of his apartment. The Officers did not know if any other people were inside the apart-

ment with Herring. However, the Officers did know that Herring was injuring himself. The Officers made a split-second judgment to enter the apartment to aid Herring and anyone else in the apartment, and to prevent Herring from leaving the apartment and placing themselves and others at risk. The Officers at no time resorted to deadly force, and only used the amount of force necessary to respond to Herring's violent acts. As in Caricofe, this approach was reasonable under the circumstances. Plaintiffs have therefore failed to establish that the Officers violated any Fourth Amendment rights. As such, the Officers are entitled to qualified immunity.

IV. PLAINTIFFS HAVE FAILED TO ALLEGE ANY CONDUCT BY THE CITY OF COLORADO SPRINGS OR ITS EMPLOYEES WHICH VIOLATED A CONSTITUTIONAL RIGHT. THEREFORE, LIABILITY CANNOT ATTACH TO THE CITY.

In Plaintiffs' first claim for relief they allege that the City failed to properly train or supervise its employees regarding contact and interaction with the mentally ill, use of force on the ill, and in the use of chemical sprays. Plaintiffs' claim that these training and supervision failures constitute a custom, practice or policy of the City. Complaint, ¶25. It appears that the Plaintiffs are basing their claims against the City on the acts of the Officers.

Liability does not attach to a municipality pursuant to § 1983 for the acts of its employees unless the plaintiff can prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation. *See Morrell v. Department of Social Services*, 436 U.S. 658, 694, 98

S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Meyers v. Oklahoma County Bd. Of County Com'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998). "It is well established, therefore, that a municipality cannot be held liable under § 1983 for the acts of an employee if it is found that the municipal employee committed no constitutional violation." *Meyers*, 151 F.3d at 1316. As previously discussed, the Officers did not commit a constitutional violation. Therefore, Plaintiffs have failed to meet the requisite predicate showing of an underlying constitutional violation. As such, the City cannot be held liable.

In addition to no constitutional violation having occurred, Plaintiffs have also failed to establish that any injury came about due to a custom, practice or policy of the City. A failure to train is a violation of §1983 only when the city's "failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be thought of as a city 'policy or custom' that is actionable under §1983." *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct 1197, 103 L.Ed.2d 412 (1989). The deficiency in policy, training or supervision must be related closely to the ultimate injury. *Id.* at 391.

Plaintiffs' allege, in a conclusory fashion, that the City failed to properly train its employees regarding interacting and use of force on the mentally ill. Plaintiffs' claim that these training deficiencies are upon information and belief. Complaint, ¶25. However, Plaintiffs fail to show that said inadequate training actually occurred. Plaintiffs merely make the bald assertion. This unsupported claim is insufficient to demonstrate deliberate indifference on the part of the City. Further, under the facts and circumstances of

this case, the Officers had to act as they did given Herring's injuries, and the possibility of others being in danger. Therefore, Plaintiffs have not shown any obvious need for more training, such that the absence of that training can be said to reflect deliberate indifference on the part of the City. *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). Therefore, Plaintiffs' claim against the City 'should be dismissed.

V. CHIEF VELEZ HAD NO PERSONAL PARTICIPATION REGARDING THE SUBJECT INCIDENT, NOR CAN CHIEF VELEZ BE HELD LIABLE BASED UPON RESPONDEAT SUPERIOR. THEREFORE, CHIEF VELEZ SHOULD BE DISMISSED.

In claims for relief one and seven, Plaintiffs' allege that Chief Velez was personally responsible for implementing customs, practices and policies, and that Chief Velez failed to properly train and supervise employees. Complaint, ¶¶26, 53 and 55. However, Plaintiffs fail to allege any actions by Chief Velez regarding the subject incident. Therefore, it appears that Plaintiffs are alleging that Chief Velez is liable under a respondeat superior theory.

"Individual liability under §1983 must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997). Furthermore, "under § 1983, 'a defendant may not be held liable under a theory of respondeat superior.'" Instead, `a plaintiff must show that an affirmative link exists between the [constitutional] deprivation and either the [defendant's] personal participation, his exercise of control or direction, or his failure to supervise.'" *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1107 (10th Cir. 2003). *See also Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir.

2000). "A defendant also may not be held liable in a civil rights action merely because of his or her supervisory position." *Ledbetter v. Board of County Com'rs of the County of Shawnee, Kansas*, 2001 WL 705806, 5 (D.Kan). "To be liable, a superior must have 'participated or acquiesced in the constitutional deprivation of which complaint is made.' *Meade v. Grubbs*, 841 F.2d 1512; 1527 (10th Cir. 1988). *See Jenkins*, 81 F.3d at 995 ("A plaintiff may satisfy this standard by showing the defendant-supervisor personally directed the violation or had knowledge of the violation and acquiesced in the continuance").

Here, although Plaintiffs name Chief Velez as a defendant, and allege that he was responsible for implementing customs, practices and policies, and failed to adequately train employees, nowhere do Plaintiffs' allege any specific actions by Chief Velez in the subject incident. Chief Velez did not personally participate in the subject incident. Furthermore, Chief Velez did not exercise any control, supervision or direction in the incident, nor is such alleged. Since Plaintiffs have failed to show an affirmative link between any alleged constitutional deprivation and Chief Velez, Plaintiffs have failed to state a claim against Chief Velez upon which relief can be granted.

VI. PLAINTIFFS' CLAIM AGAINST CHIEF VELEZ IN HIS OFFICIAL CAPACITY IS REDUNDANT AND THEREFORE SHOULD BE DISMISSED.

Plaintiffs allege that Chief Velez failed to properly train and supervise employees, and he was responsible for implementing customs, practices and policies. Complaint, ¶¶26, 53 and 55. Plaintiffs are suing Chief Velez in his individual and official capacity. *Id.*

at ¶9 and caption. In addition, Plaintiffs are alleging the same claim against the City. *Id.* at ¶25.

"A suit against a city official in his official capacity is no different from a suit against the city itself." *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511, 1517 (10th Cir. 1995). (Emphasis in opinion). *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2313, 105 L.Ed.2d 45 (1989). As was held in *Davoll v. Webb*, 943 F.Supp. 1289, 1295 (D.Colo. 1996), *aff'd* 194 F.3d 1116 (10th Cir. 1999):

> A § 1983 claim is properly plead against a municipality "either by naming the municipality itself or by naming a municipal official in his or her official capacity". *Stump v. Gates*, 777 F.Supp. 808, 816 n.3 (D.Colo. 1991), *aff'd* 986 F.2d 1429 (10th Cir. 1993). "Naming either is sufficient. Naming both is redundant." *Id.* [o]fficial capacity suits generally represent only another way of pleading an action against an entity of which the officer is an agent. . ." *Monell*, 436 U.S. 690 n. 55, 98 S.Ct. at 2035 n. 55. "Where a suit contains both entity and official capacity claims, the only defendant is the entity." *Doe v. Douglas County Sch. Dist.*, 775 F.Supp. at 1416.

Since Plaintiffs have also named the City as a defendant, naming Chief Velez in his official capacity is redundant. Therefore, Chief Velez should also be dismissed from the official capacity claim. In addition, the rational which defeats the claim against the City also defeats the claim against Chief Velez. *See Thompson*, 58 F.3 d at 1517; *Hinton v. City of Elwood Kan.*, 997 F.2d 774, 783 (10th Cir. 1993).

VII. PLAINTIFFS HAVE FAILED TO ALLEGE STATE TORT CLAIMS UPON WHICH RELIEF CAN BE GRANTED. THERE-FORE, THE STATE TORT CLAIMS SHOULD BE DISMISSED.

A. The Defendants Are Immune From The Tort Claims Pursuant To The Colorado Governmental Immunity Act.

In Plaintiffs' second and fourth claims for relief they allege state tort claims of negligence and intentional infliction of emotional distress. Pursuant to the Colorado Governmental Immunity Act ("CGIA"), Defendants are immune from these claims.

Except in certain limited circumstances, the CGIA provides that a governmental entity, and its employees, are immune from liability in all actions which lie in tort or could lie in tort. *See* §§24-10-105, 24-10-106, 24-10-108, C.R.S. Section 24-10-106 provides the circumstances under which immunity is waived. Nowhere in §24-10-106 is immunity waived for negligence or intentional infliction of emotional distress claims. Therefore, the CGIA bars these claims as the court lacks subject matter jurisdiction.

B. The Officers Conduct Did Not Rise To The Level Necessary To Support An Intentional Infliction Of Emotional Distress Claim, Nor Were Plaintiffs In The Zone Of Danger.

In Plaintiffs' fourth claim for relief they allege that Herring's children were present in the "zone of danger" at the time of the incident, and that the Officers' conduct caused the children to suffer emotional distress. Complaint, ¶¶35-38. It is true that when the Officers arrived at the apartment they did

not know if anyone, including the children, were inside the apartment with Herring and in danger. Exhibit C, ¶¶31-32; Exhibit D, ¶¶34-35. However, as it turned out, Herring's children were not present in the apartment. Exhibit C, ¶¶13 and 34.

Claims of outrageous conduct and intentional infliction of emotional distress are simply "two ways of stating the same claim." *English v. Griffith*, 99 P.3d 90, 93 (Colo.App. 2004). In Colorado, the elements of outrageous conduct are: (1) the defendant engaged in extreme and outrageous conduct; (2) the defendant engaged in such conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) the defendant's conduct caused plaintiff to suffer emotional distress. *Culpepper v. Pearl Street Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994). Proof of the tort of outrageous conduct under Colorado law must consist of either an extreme act, both in character and degree, or a pattern of conduct from which the decisive conclusion is that infliction of severe mental suffering was calculated or recklessly or callously inflicted on the plaintiff. *Gard v. Teletronics Pacing Systems, Inc.*, 859 F.Supp. 1349, 1354 (D.Colo. 1994).

The first element, extreme and outrageous conduct, is satisfied if the conduct goes "'beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community.'" *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753, 756 (1970). It is the court's responsibility, as an initial matter, to determine whether reasonable persons could differ on the question. *See Meiter v. Cavanaugh*, 40 Colo.App. 454, 580 P.2d 399, 401 (1978).

In the present case, Plaintiffs offer no evidence to support any conclusion that the Officers' engaged in outrageous conduct. The facts do not even remotely

approach outrageous conduct. Reasonable persons could not conclude that the Officers' conduct was so extreme in degree as to be "atrocious" and "utterly intolerable". Further, there is no evidence to suggest that the Officers' actions were reckless, nor were they undertaken with the intent to cause severe emotional distress. Therefore, Plaintiffs' intentional infliction of emotional distress claim cannot stand.

In addition, Herring's children were not in the "zone of danger". "[I]f the plaintiff is not subject to a direct threat of harm or an unreasonable risk of bodily harm, then he is not within the 'zone of danger', and therefore, cannot recover under this claim." *Atespoyi v. Tandy Corp.*, 51 F.Supp.2d 1120, 1127 (D.Colo. 1999). *See Card v. Blakeslee*, 937 P.2d 846 (Colo.App. 1996). "Similarly, the Colorado Supreme Court noted, '[w]e have never recognized a cause of action for emotional distress grounded in negligence without proof that the plaintiff sustained a physical injury or was in the "zone of danger."' *Id.* quoting *Culpepper*, 877 P.2d at 880. Further, "the United States Supreme Court asserted the 'zone of danger' test limits recovery to plaintiffs who sustain a physical impact resulting from defendant's negligence, or who are placed within immediate risk of physical harm by that conduct." *Atsepoyi*, 51 F.Supp.2d at 1127. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994). Since Herring's children were not in the apartment at the time of the encounter between the Officers and Herring, they were not in the "zone of danger". Therefore, Plaintiffs' intentional infliction of emotional distress claim cannot stand.

C. The Officers' Conduct Did Not Rise To The Level Necessary To Support A Willful And Wanton Claim.

In Plaintiffs' third claim for relief they allege that the Officers' actions were willful and wanton. Complaint, ¶32. However, as with the intentional infliction of emotional distress claim, Plaintiffs offer no evidence to support this claim.

"[I]n order to satisfy the 'willful and wanton' exception to the Colorado Governmental Immunity Act (CGIA) shielding governmental officials from suits in tort, a plaintiff must establish not only the elements of [the underlying] claim. . . but also that the defendant's conduct was done heedlessly and recklessly, without regard to the consequences, or rights and safety of others, particularly plaintiff" *Drake v. City and County of Denver*, 953 F. Supp. 1150, 1160 (D.Colo. 1997), *aff'd*, 161 F.3d 17 (10th Cir. 1998). Under the undisputed facts of this case, it could not be concluded that the Officers' actions were done heedlessly and recklessly, without regard to the consequences, or rights and safety of others. The Officers' actions were done in order to help those involved, or who may have been involved. Therefore, Plaintiffs' willful and wanton conduct claim should be dismissed.

VIII. THE OFFICERS' CONDUCT DID NOT RISE TO THE LEVEL NECESSARY TO SHOCK THE CONSCIENCE.

In Plaintiffs' tenth claim for relief they claim that the Officers' conduct rose to the level of conscience shocking behavior so as to create a substantive due process violation. Complaint, ¶69. However, as with Plaintiffs' intentional infliction of emotional distress

and willful and wanton claims, under the undisputed facts of this case, the Officers' conduct was not conscience shocking.

"The standard for a substantive due process claim is whether the challenged government action would 'shock the conscience of federal judges.'" *Tonkovich v. Kansas. Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998) quoting *Uhlrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995). To satisfy this standard, plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. *Id.* at 574. "[N]egligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Scaramento v. Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Plaintiff must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Uhlrig*, 64 F.3d at 574. "Conscience shocking behavior generally falls on the far side of the culpability spectrum, requiring plaintiff to show that the government actor performed with an intent to harm." *Richard v. Perkins*, 2005 WL 1391167, 6 (D.Kan.). "Further, it must be remembered that the *officer's conduct* must shock the conscience, and not simply the *results* of the officer's conduct." *Hayes v. Garcia*, 123 Fed.Appx. 858, 861 (10th Cir. 2005). (Emphasis in opinion).

It is clear from the facts that the Officers' intent was not to harm Herring, but rather to help Herring. Even when acting in self-defense the Officers never resorted to deadly force, and always had the goal of restraining Herring so that Herring could be helped. The Officers' conduct does not even remotely approach conscience

shocking behavior. Therefore, Plaintiffs' conscience shocking claim should be dismissed.

IX. ME OFFICERS DID NOT INTEND TO INTERFERE WITH PLAINTIFFS' PERSONAL RELATIONSHIP. THEREFORE, PLAINTIFFS' DEPRIVATION OF FAMILIAL COMPANIONSHIP CLAIM MUST BE DISMISSED.

In Plaintiffs' eighth claim for relief they claim that the Officers' violated their constitutional rights to familial association because of Herring's death. Complaint, ¶61. However, Plaintiffs do not contend that the Officers' intended to interfere with the family relationship, Plaintiffs' merely contend that the relationship was interfered with due to Herring's death.

"[A]n allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under 1983." *Trujillo v. Board of County Com'rs of Sante Fe County*, 768 F.2d 1186, 1190 (10th Cir. 1985). Such intent is shown by establishing that the defendant or defendants "directed" their challenged conduct or statement at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship. *J.B. v. Washington County*, 127 F.3d 919, 927 (10th Cir. 1997) citing *Griffith v. Strong*, 983 F.2d 1544, 1548 (10th Cir. 1993). Therefore, to withstand summary judgment Plaintiffs must allege and identify evidence raising an inference of intent to interfere with a particular personal relationship between Plaintiffs and Herring that is protected by the freedom of intimate association. *See Trujillo*, 768 F.2d at 1189-90. As such, "a Fourteenth Amendment claim based on familial association must be based on specific intent

to interfere with that association." *Hill v. Martinez*, 87 F.Supp.2d 1115, 1119 (D.Colo. 2000).

In the present case, the complaint does not contain any allegation of intent to interfere with a relationship between Plaintiffs and Herring. Further, Plaintiffs fail to cite any evidence or specific facts with respect to the intent to interfere requirement. Plaintiffs merely contend that the relationship has been violated because Herring died. "Plaintiffs therefore do not have standing as a matter of law to assert their personal Section 1983 claims." *Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1185 (D.N.M. 2004). *See Trujillo*, 768 F.2d at 1190 (granting summary judgment against plaintiffs on their Section 1983 claims asserting deprivation of their rights to familial association because the record did not contain evidence of an intent to deprive plaintiffs of their relationship with their son and brother); *Fuentes v. Thomas*, 107 F.Supp.2d 1288, 1296 (D.Kan. 2000) (granting summary judgment against plaintiffs on their Section 1983 claims asserting deprivation of plaintiffs' constitutional rights to familial association with decedent because plaintiffs failed to cite any evidence of intent to interfere). Not only have Plaintiffs failed to cite any evidence of the Officers' intent to interfere with their relationship, the facts establish that the Officers' intent was to help Herring, not to interfere with any relationship. Therefore, since Plaintiffs have failed to allege and provide the requisite evidence of intent, Plaintiffs' claim should be dismissed.

X. PLAINTIFFS' PRAYER FOR RELIEF SEEKING EXEMPLARY OR PUNITIVE DAMAGES MUST BE DISMISSED.

To the extent that Plaintiffs are seeking exemplary damages against the City or Chief Velez in his official

capacity, said damage claims must be dismissed. Exemplary damages may not be recovered against a public entity pursuant to claims based on 42 U.S.C. § 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Honorable Court enter an order granting Defendants' Motion for Summary Judgment, and dismiss Plaintiffs' complaint with prejudice, and for any other relief this Court deems appropriate.

Dated this 1st day of August, 2005.

Respectfully submitted,

PATRICIA K. KELLY
City Attorney/Chief Legal Officer
Reg. No. 014408

s/Shane M. White
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defndants.

AFFIDAVIT OF SCOTT ELDER

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Scott Elder, having been duly sworn upon oath, depose and hereby state as follows:

1. I have personal knowledge of the facts stated herein.

2. On May 2, 2003, I was residing at Winfield Apartments, 5430 Grantsville Grove, Apt 202, Colorado Springs, CO 80922. At this time I observed from my second floor apartment an incident involving Gregory Herring that prompted me to call 911.

3. I was acquainted with Mr. Herring because he lived in an apartment building across the parking lot from me in the same apartment complex, and we would occasionally socialize.

4. At approximately 2:00 to 2:30 p.m. on May 2, 2003, I heard a banging noise coming from outside. I looked outside and saw Mr. Herring banging on apartment doors, I then observed Mr. Herring come across the parking lot towards my apartment building. I then heard a noise which sounded like banging on doors below my apartment. I then heard Mr. Herring yelling and heard him stomping up the stairs towards my apartment. I knew this was Mr. Herring because I recognized his voice.

5. Mr. Herring then began to pound on my door. Mr. Herring was pounding on my door so violently that he was shaking the whole apartment. I feared he would break open the door.

6. Mr. Herring is approximately 6'2" and 240 lbs.

7. Fearing for my safety I retreated to my balcony and called 911. If Mr. Herring had broken into my apartment I would have had to jump from my balcony to escape.

8. While I was speaking with the 911 operator Mr. Herring left my front door. Moments later I heard a loud crash sounding like glass breaking, looked out my window and observed Mr. Herring's three children running from Mr. Herring's apartment screaming. Soon thereafter I heard another crash, again looked out my window and observed Mr. Herring throwing a chair out of his apartment window.

9. I reported all of this to the 911 operator and then ended the call.

10. Shortly thereafter I called 911 back to report further observations.

11. I observed that Mr. Herring was continuing to strike and break out his windows. I also observed

that Mr. Herring was continuing to throw items out of the window such as children's toys.

12. At this time I observed that Mr. Herring was nude, that his arms were slashed and bleeding, and that his abdomen was cut. It appeared that Mr. Herring's cuts were caused by the bra en glass from the windows.

13. Although I had seen Mr. Herring's children run from the apartment, based upon Mr. Herring's actions, and the children screaming as they ran, I was in fear for the children in that I wasn't certain if all of Mr. Herring's children had fled the apartment or what Mr. Herring might do to the children if Mr. Herring left the apartment.

14. After speaking with 911, I observed a fire engine from the Colorado Springs Fire Department and an ambulance from AMR arrive and park in the parking lot. I then observed a Colorado Springs police officer arrive.

15. I then directed this officer to Mr. Herring's apartment.

16. I then observed two other police officers arrive in separate vehicles. I also directed them to Mr. Herrings apartment.

17. A few minutes later I observed the Fire Department and AMR personnel approach and enter Mr. Herring's apartment. Later I observed the AMR ambulance drive away.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 21st day of June, 2005.

/s/ Scott Elder
SCOTT ELDER

SUBSCRIBED AND SWORN to before me this 21St day of lime, 2005, by Scott Elder. Witness my hand and official seal.

/s/ Tiffany M. Haywood
Notary Public

My Commission expires: 01/26/2008

[Seal]

THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

AFFIDAVIT OF OFFICER GARY DARRESS

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Officer Gary Darress, having been duly sworn upon oath, depose and hereby state as follows:

1. I am a police officer with the Colorado Springs Police Department and was employed in that capacity on May 2, 2003.

2. I am a Defendant in this action and have personal knowledge of the facts gated herein.

3. While on duty with the Colorado Springs Police Department, on May 2, 2003, I received a call from dispatch to respond to a disturbance, While enroute to the disturbance I was informed that the reporting party was a neighbor of the individual causing the disturbance and that he had reported that the individual causing the disturbance was at

the reporting party's apartment beating on his door. I was later informed that the reporting party had called back and reported that the individual causing the disturbance was now in his own apartment, was naked, bleeding from a cut on his arm and a cut on his abdomen, and was throwing items out of a window onto the ground outside.

4. When I arrived at the apartment complex I met with a unit from the Colorado Springs Fire Department ("CSFD") who had already arrived at the scene.

5. At this time a resident of the apartment complex directed me to where the individual who was causing the disturbance lived.

6. As I approached the front of the apartment I observed a window had been broken out and numerous household items were lying on the ground outside of that broken window. Many of the Rents that were thrown out of the window were childrens' items such as bikes, toys, etc. This indicated to me that children lived in the apartment.

7. Upon approaching the apartment I looked through a broken window and observed that items in the apartment had been thrown all over, that there was blood on the walls, and that the inside of the apartment generally looked like a bomb had gone off.

8. I did not know at this time who was in the apartment, i.e. whether only the subject individual was alone inside the apartment or whether other individuals and/or family members were inside as well.

9. From where I stood outside the broken window I could hear a grunting or moaning noise coming from someone in the apartment.

10. At that time the apartment resident who initially directed me to the subject apartment yelled something about the kids.

11. I then walked from the first broken window around the exterior of the apartment. I noticed that every window in the apartment had been broken out. I also noticed blood throughout the other rooms in the apartment as I looked through those broken windows.

12. Upon approaching a window on the back side of the apartment I observed through a broken window the subject individual. This individual was later identified as Gregory Herring. I observed that Mr. Herring was naked and leaning out of the window with his abdomen pressed against the lower window frame which contained pieces of broken glass. I suspected that the cut I observed on Mr. Herring's abdomen came from the broken glass.

13. At that time I contacted Mr. Herring by introducing myself. Mr. Herring continued to throw items out of the window.

14. I thought that because Mr. Herring had a 2½ inch to 3 inch cut on his right arm, and a cut on his abdomen that Mr. Herring was intentionally injuring himself and possibly attempting to commit suicide. Due to the apartment resident's prior statement about the children, I did not think the children were in the apartment, however I thought that Mr. Herring was at risk to himself.

15. At this time Officers Rory Carroll and Brent Ambuehl arrived. I believed that Officers Carroll and Ambuehl could gain entry into the apartment while I distracted Mr. Herring at the broken window. I believed Officers Carroll and Ambuehl would be able

to subdue Mr. Herring so that we could prevent Mr. Herring from continuing to hurt himself, get Mr. Herring medical attention, and prevent Mr. Herring from jumping out the broken window and either injuring himself further or becoming a threat to others.

16. I directed Officers Carroll and Ambuehl to go in the front door of the apartment. Officers Carroll and Ambuehl came back and indicated that the front door was locked. I then directed Officers Carroll and Ambuehl to kick in the front door to gain entry into the apartment.

17. A short time later I observed Officer Carroll inside the apartment and across the room from Mr. Herring. At that time Mr. Herring looked at Officer Carroll and began to advance towards him. As Mr. Herring approached, Officer Carroll sprayed Mr. Herring once in the face with a one second burst of oleoresin capsicum (O.C. or mace).

18. After being sprayed, Mr. Herring hesitated for a second, wiped the O.C. from his face, and then charged at Officer Carroll initiating physical contact with Officer Carroll.

19. At this time I ran around the apartment and entered the apartment through the front door. Upon entering the apartment I saw a blanket lying on the ground. I grabbed the blanket with the intention of wrapping it around Mr. Herring to subdue him, and also to protect the officers from Mr. Herring's blood and other bodily fluids.

20. I went through the apartment and observed Officers Carroll and Ambuehl on the floor inside a small bathroom with Mr. Herring and were attempting to gain control of Mr. Herring.

21. The bathroom was extremely confined and included a bathtub, sink and toilet. There was water and blood all over the bathroom and the bathroom floor.

22. Mr. Herring was face down on the bathroom floor, Officer Carroll was on the left side of Mr. Herring in the area of Mr. Herring's head and shoulders, and Officer Ambuehl was at Mr. Herring's feet.

23. I then entered the bathroom and attempted to wrap Mr. Herring in the blanket. Because Mr. Herring was struggling so much I was unable to get the blanket around Mr. Herring. The blanket went flying off and into the bathtub. I was now on Mr. Herring's right side by Mr. Herring's head and shoulders,

24. I then took out my handcuffs and handed them to Officer Carroll who was able to get one cuff around Mr. Herring's left wrist. However, due to Mr. Herring fighting, Officer Carroll was unable to get the cuff around Mr. Herring's right wrist. Mr. Herring was struggling so bard that he was physically lifting myself and Officer Carroll off the floor.

25. Mr. Herring then grabbed my testicles and squeezed extremely hard causing extreme pain. I let out a scream and struck Mr. Herring in an attempt to get him to let go of my testicles. I did not strike Mr. Herring with the knuckle part of my fist but rather with the soft side of the fist opposite the thumb using a motion as if holding a hammer. It was not until I had struck Mr. Herring possibly 5-6 times on the head that Mr. Herring finally let go of my testicles.

26. At this time Mr. Herring proceeded to bite Officer Carroll's hand at which time Officer Carroll struck Mr. Herring on the head with his fist in an

attempt to get Mr. Herring to let go of Officer Carroll's hand.

27. While Mr. Herring was biting Officer Carroll Mr. Herring also grabbed my PR-24 (baton) and pulled it out of the holder. I fought to get the PR-24 back as I did not want Mr. Herring using it as a weapon. Even after I was able to get the PR-24 back Mr. Herring continued to fight. At this time I struck Mr. Herring on the head 3-4 times using a flat chop. A flat chop is a technique whereby the PR-24 is held by the short handle and the long extended portion of the PR-24 is parallel to the forearm.

28. Throughout the entire time I was yelling at Mr. Herring to calm down, but Mr. Herring did not respond in any manner other than continuing to fight. I thought at that time that Mr. Herring must be on PCP.

29. Mr. Herring then bit into my right knee at which time I struck Mr. Herring's head with my fist about 5 times yelling at him to stop biting my knee.

30. At that time I called over the radio for medical personnel to come in and assist as we were not being successful in restraining Mr. Herring. I believed that with additional people we would be, able to over-power and subdue Mr. Herring and d get Mr. Herring the medical help he needed.

31. Mr. Herring continued to fight and physically lifted myself and Officer Carroll up off the floor. At that time I took my thumb and pressed it into a pressure point on the side of Mr. Herring's neck in order to get him to comply with our commands to calm down. However, this maneuver had no effect.

32. During the struggle I was eventually able to get Mr. Herring's right wrist cuffed so that both of Mr. Herrings hands were cuffed in front of him. Even while cuffed Mr. Herring continued to fight.

33. I again called for medical personnel to come in and assist.

34. At this time Mr. Herring pushed himself up, while I was on his back, so that he was now on his forearms and had his upper body propped up off the floor.

35. Believing that if Mr. Herring to got up we could not contain him, 1 proceeded to push down with my arms and torso/upper body as I laid on his back in order to get Mr. Herring back on his stomach, My pushing was like a jumping motion with my upper body as I laid on Mr. Herring.

36. Finally, CSFD and AMR personnel came in. One of the paramedics then gave Mr. Herring a shot of medication in Mr. Herring's buttock. This had no effect on Mr. Herring and Mr. Herring continued to fight. A paramedic then gave Mr. Herring a second shot of medication. Shortly after, Mr. Herring slowly began to calm down.

37. After Mr. Herring calmed down one Of the paramedics asked if Mr. Herring was breathing. I checked Mr. Herring's pulse, which he had, and saw that Mr. Herring was breathing. I confirmed his to the paramedic.

38. Because Mr. Herring had now calmed down and no longer was a threat to anyone, including himself, myself and Officers Carroll and Ambuehl left the bathroom and went outside to seek medical attention for our injuries. Mr. Herring was then left in the care of the paramedics.

39. A few minutes after we left the apartment an Al. paramedic come out of the apartment and stated that Mr. Herring had stopped breathing.

40. Mr. Herring was immediately transported to the hospital. We were later advised that Mr. Herring had died.

41. As it turned out, Mr. Herring's children were not in the apartment at the time we arrived. I was later told that the children had gone to a neighbor's apartment.

42. While I was outside I observed trails of blood along the sidewalk and on other apartment doors as if Mr. Herring had been going from apartment to apartment beating on the doors.

43. My intent in entering Mr. Herring's apartment was to subdue Mr. Herring so that medical aid could be administered to Mr. Herring. It was apparent to me that Mr. Herring was intentionally injuring himself as evidenced by the cuts and blood on his body, the blood on the apartment walls, the broken windows and the destroyed condition of the apartment. It was my opinion at the scene that Mr. Herring needed immediate medical help.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 20th day of July, 2005.

/s/ Gary Darress
OFFICER GARY DARRESS

SUBSCRIBED AND SWORN to before me this 20th day of July, 2005, by Officer Gary Darress.

Witness my band and official seal.

/s/ Allen Leonard
Notary Public

My Commission expires: 5/24/07

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

AFFIDAVIT OF OFFICER RORY CARROLL

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Officer Rory Carroll, having been duly sworn upon oath, depose and hereby state as follows:

1. I am a police officer with the Colorado Springs Police Department and was employed in that capacity on May 2, 2003.

2. I am a Defendant in this action and have personal knowledge of the facts stated herein.

3. While on duty with the Colorado Springs Police Department, on May 2, 2003, I was dispatched to a disturbance, Initially, I was informed that a man was banging on another individual's apartment door and trying to get inside that apartment. Then, while enroute to the scene, I was informed that the individual causing the disturbance was a nude man, was running through the apartment complex banging on

doors, that children had run from this individual's apartment, that furniture and clothing were being thrown from this individual's apartment, and that this individual was tearing up his apartment.

4. When I arrived at the apartment complex Officer Brent Ambuehl was arriving behind me.

5. As I looked around the apartment complex I observed blood on one or two apartment doors. At this time an apartment resident directed myself and Officer Ambuehl to the subject individual's apartment. This was a different apartment than the ones that I observed with blood on the doors.

6. When we arrived at the subject apartment I observed Officer Gary Darress outside a broken window speaking to an individual who was in the apartment. This individual was later identified as Gregory Herring. Officer Darress was telling Mr. Herring to calm down. Mr. Herring was throwing things out of a broken window. I observed that childrens' clothes, furniture, etc., had been thrown out of the window. I had also observed that the front and back windows of the apartment had been broken out.

7. Officer Darress then directed Officer Ambuehl and myself to go around to the front door. Officer Ambuehl went to the front door as I waited at the corner of the building. Officer Ambuehl came back and said the front door was locked. Officer Darress then directed us to kick hi the front door and enter the apartment.

8. Officer Ambuehl and myself then went to the front door, kicked it in, and entered the apartment.

9. I observed that the apartment was in shambles. Various items had been thrown everywhere and Officer Ambuehl and myself had to maneuver over things in order to pass through the apartment.

10. At this time I went through the apartment to the bedroom where Mr. Herring was located. I went through a hallway which led to the door to the bedroom and bathroom where Mr. Herring was. The bathroom was extremely small and the floor was covered with water and blood. I stopped in the bedroom by the entrance to the bathroom. I observed that Mr. Herring was in the bedroom naked, had blood all over his arm and abdomen, and blood was all over the apartment walls.

11. Mr. Herring at this time looked at me and threw a broken shelf and a bottle at me, Mr, Herring then approached me. I then told Mr. Herring to stop. Mr. Herring continued to approach at which time I sprayed Mr. Herring once with a one-second burst of oleoresin capsicum (O.C. or mace) in his left eye. I sprayed Mr. Herring because he was behaving aggressively by throwing objects at me and would not stop approaching when ordered.

12. Mr. Herring covered his eyes, turned away for one second, looked back at me, stated that "we are all going to die", and charged at me.

13. I believed Mr. Herring meant what he said and I was frightened by that. I again ordered Mr. Herring to stop, but he did not and continued to charge into me.

14. Mr. Herring initiated physical contact with me by grabbing me by my left shoulder and pushing me back. Instinctively, I grabbed Mr. Herring, The door behind us from the hallway to the bedroom slammed

shut as Mr. Herring forced me backwards striking the door, and then myself and Mr. Herring fell onto the bathroom floor. I was alone with Mr. Herring in the bathroom at this time.

15. At this time Mr. Herring grabbed my testicles and squeezed. I screamed in pain am struck Mr. Herring with my fist one time in the middle of Mr. Herring's back, I ordered Mr. Herring to let me go. Mr. Herring did not let go so 1 struck Mr. Herring again with my fist on his back. Mr. Herring then let go and tried to get up. Mr. Herring said once again, "we are all going to die".

16. Officers Darress and Ambuehl then came to my aide from Mr. Herring's attack. Mr. Herring was now face down on the bathroom floor and I was on Mr. Herring's left side by his head and shoulders. Officer Darress came over onto Mr. Herring's right side by his head and shoulders, and Officer Ambuehl was at Mr. Herring's feet.

17. We were all fighting with Mr. Herring and trying to get Mr. Herring restrained. During this time I struck Mr. Herring on his shoulder with my fist. Officer Darress then gave me his handcuffs and I was able to get one cuff around Mr. Herring's left wrist.

18. During the fight I kept thinking that Mr. Herring was going to try to get our guns as he at one point grabbed my firearm holster.

19. In an effort to control Mr. Herring's anus I tried to pull Mr. Herring's left arm behind his back but Mr. Herring pulled me forward. I then struck Mr. Herring with my fist on his shoulder.

20. In another attempt to control Mr. Herring's arms I then pulled out my PR-24 (baton) and put the PR-24 under Mr. Herring's armpit and tried to pull his arm back. This did not work so I gave my PR-24 to Officer Ambuehl to use under Mr. Herring's legs as a compliance maneuver. This also did not work. Officer Ambuehl then placed the PR-24 on the counter by the sink.

21. At this time I tried to get Mr. Herring's right arm cuffed so that Mr. Herring's hands would be cuffed in front of him. I reached over to cuff his right wrist and Mr. Herring bit my left ring finger.

22. Screaming in pain I struck Mr. Herring in the side of the face with my fist and ordered Mr. Herring to let go of my finger. Mr. Herring did not let go so I struck Mr. Herring a second time, again ordering him to let go, Mr. Herring then let go of my finger and again tried to get up.

23. At this time Officer Darress was able to get Mr. Herring's right wrist cuffed. Mr. Herring was still fighting and pushed himself and both myself and Officer Darress up off the floor and tried to roll over. I then struck Mr. Herring twice in the back with my fist and ordered him to get down.

24. Mr. Herring again reached back with his hands and grabbed my firearm holster. I thought that Mr. Herring was trying to take my firearm out of the holster so I put my hand on my firearm to keep Mr. Herring from taking it.

25. Medical personnel from AMR and CSPD finally came in at which time I requested they give Mr. Herring something to calm him down. AMR personnel gave Mr. Herring a shot of medication in

the left buttock. Mr. Herring continued to fight and tried to roll over.

26. I then observed Mr. Herring receiving a. second shot. Mr. Herring continued to struggle for a couple of minutes and then began to calm down.

27. At this time myself and Officers Darress and Ambuehl left the bathroom and went outside. As I was getting up off the floor I could see that Mr. Herring was breathing.

28. A short time later a paramedic came out of the apartment and stated that Mr. Herring had stopped breathing.

29. I estimate that Mr. Herring was 6'2" to 6'3" tall and was very muscular.

30. At no time did I strike Mr. Herring with anything except my fists.

31. When we entered the apartment I did not know if anyone was in the apartment with Mr. Herring that may have been in danger. I had heard that kids had run from the apartment, however, I did not know if anyone else was in the apartment with Mr. Herring.

32. When we entered the apartment my main concern was that someone else could bay, been in the apartment with Mr. Herring. It was my opinion at the time that if anyone else was in the apartment they would have been in danger and in need of immediate help due to the amount of blood I saw on Mr. Herring and on other apartment doors, I did not know if the blood was all from Mr. Herring, or if any blood was from someone else. When Officer Darress sent us to go into the e front door he indicated that there was blood everywhere and to be careful.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 18th day of July, 2005.

/s/ Rory Carroll
OFFICER RORY CARROLL

SUBSCRIBED AND SWORN to before me this 18th day of July, 2005, by Rory Carroll.

Witness my hand and official seal.

/s/ Jere Hager
Notary Public

My Commission expires: 10-20-08

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *at al.*,
Defendants.

AFFIDAVIT OF OFFICER BRENT AMBUEHL

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Officer Brent Ambuehl, having been duly sworn upon oath, depose and hereby state as follows:

1. I am a police officer with the Colorado Springs Police Department and was employed in that capacity on May 2, 2003.

2. I am a Defendant in this action and have personal knowledge of the facts stated herein.

3. While on duty with the Colorado Springs Police Department, on May 2, 2003, I was dispatched to a disturbance. I was informed that an individual with cuts on his arms and an abdomen wound was running from apartment to apartment banging on doors. I was also informed that children were living with this individual.

4. When I arrived on scene I noticed that a unit from the Colorado Springs Fire Department ("CSFD") and an ambulance from American Medina/ Response ("AMR") were already on scene. Officer Rory Carroll had also arrived just in front of me.

5. At this time I followed Officer Carroll to the apartment where the individual who was causing the disturbance lived.

6. When Officer Carroll and I got to this apartment I observed that the glass in all of the windows had been broken out.

7. I then observed that Officer Gary Darress was speaking with an individual in the apartment. This individual was later identified as Gregory Herring. While Officer Darress was speaking with Mr. Herring, Mr. Herring was throwing items out of the broken window, and was yelling. Broken glass was everywhere.

8. At this time I observed that Mr. Herring was naked, bleeding, and it appeared that he was harming himself. Mr. Herring had blood all over his abdomen and body and there was blood on the sidewalk.

9. I had heard that children lived with Mr. Herring, however I did not know if any children were present in the apartment with Mr. Herring.

10. Officer Darress directed Officer Carroll and myself to go to the front door. I went to the front door, however it was locked. I came back and told Officers Darress and Carroll that the front door was locked. Officer Darress then directed Officer Carroll and myself to kick in the door and enter the apartment.

11. Officer Carroll and I kicked in the front door and entered the apartment

12. Officer Carroll immediately went to the back bedroom where Mr. Herring was located,

13. I did not know if any children, or anyone else, were present in the apartment. Therefore, while Officer Carroll went to the back bedroom I checked the remainder of the apartment to see if anyone else was present. No one else was in the apartment.

14. I then went towards the back bedroom. A hallway led to the bedroom which had a bathroom. There was a door between the hallway and the bedroom and bathroom. Officer Carroll had gone into the bedroom and stood by the entrance to the bathroom. I stood at the door between the hall and the bedroom.

15. At this time I saw Mr. Herring approach Officer Carroll and observed Officer Carroll direct Mr. Herring to calm down and step back, I then observed Officer Carroll spray Mr. Herring with oleoresin capsicum (O.C, or mace) once in the face for one second or less. Mr. Herring said, "now we're all going to die", and charged at Officer Carroll. When Mr. Herring attacked Officer Carroll they fell to the floor and the door between the hall and bedroom was forced shut. I then forced open the door to gain entry into the bedroom.

16. At this time I saw Officer Carroll and Mr. Herring fighting on the bathroom floor.

17. I noticed that the toilet, door, and bathtub had blood all over them, and the bathroom floor was wet and bloody.

18. I then grabbed Mr. Herring's feet and was telling Mr. Herring to stop resisting.

19. Mr. Herring was fighting so hard that he was throwing myself and Officer Carroll around the bathroom.

20. Officer Darress then came in with a blanket and tried to wrap it around Mr. Herring, however that did not work.

21. Mr. Herrings left heel then kicked TAB in the left eye.

22. Officers Darress and Carroll were attempting to restrain Mr. Herring's upper body as I was trying to hold Mr. Herring's legs.

23. At this time Officer Carroll pulled out his PR-24 (baton) and Officer Carroll and myself attempted to maneuver the PR-24 under Mr. Herring's arm to restrain his arms however that did not work. Officer Carroll then handed me the PR-24 to do a compliance maneuver on Mr. Herring's legs. That maneuver did not work either, so I then placed the PR-24 on the counter by the sink.

24. At this time I wedged my right knee into the side of Mr. Herring's right thigh and wedged my right leg against the wall for leverage in order to restrain Mr. Herring's legs. This did not work and Mr. Herring continued to fight. We did not have control of Mr. Herring.

25. Officer Darress then called for assistance.

26. Finally, the CSFD and AMR personnel arrived. At this time a CSFD officer attempted to assist me in holding down Mr. Herring.

27. A medical person then gave Mr. Herring a shot of mediation in his left buttock. This did not have any effect on Mr. Herring,

28. A couple of minutes later a medical person gave a second shot to Mr. Herring.

29. Shortly after the second shot, Mr. Herring began to calm down.

30. Officers Darress, Carroll and myself then left the bathroom and apartment to obtain medical treatment due to injuries we received while attempting to restrain Mr. Herring.

31. While outside the apartment I looked around the apartment complex. I saw 4 to 5 doors with blood on them where Mr. Herring had apparently been pounding, At this time, a paramedic came out of Mr. Herring's apartment and stated that Mr. Herring had stopped breathing.

32. At no time did I strike Mr. Herring. My contact with Mr. Herring consisted of holding Mr. Herring's feet and legs, and wedging ray right knee against Mr. Herring's right thigh,

33. I estimate that Mr. Herring was 6'2" to 6'4" tali and 225 lbs. or more. After the incident I saw a picture of Mr. Herring and he appeared to have the physique of a body builder.

34. Prior to my arrival I had been informed that Mr. Herring had children. Prior to entering the apartment I did not know if any children were in the apartment with Mr. Herring, however, 1 was concerned that the children may be in the apartment. I discovered that children were not present.

35. My reason for kicking in the door and entering the apartment was to help any children who may

have been in the apartment, It was my opinion at the time that if any children were in the apartment they would have been in danger and in need of immediate help.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 26th day of July, 2005.

/s/ Brent Ambuehl
OFFICER BRENT AMBUEHL

SUBSCRIBED AND SWORN to before me this 26th day of July, 2005, by Officer Brent Ambuehl.

Witness my hand and official seal.

/s/ Tiffany M. Haywood]
Notary Public

My Commission expires: 01/26/2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

AFFIDAVIT OF FIREFIGHTER/PARAMEDIC
CLARK GADDIE

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Firefighter/Paramedic Clark Gaddie, having been duly sworn upon oath, depose and hereby state as follows:

1. I am a firefighter/paramedic with the Colorado Springs Fire Department and was employed in that capacity on May 2, 2003. 1 have been a firefighter/paramedic with CSFD for nine years.

2. I have personal knowledge of the facts stated herein.

3. On May 2, 2003, a call came into the Colorado Springs Fire Department, Station # 17, to respond to a disturbance described as an assault. Upon arrival at the scene we staged, or stationed ourselves, in the parking lot of the apartment complex.

4. Shortly after our arrival at least two and possibly three Colorado Springs Police Department officers arrived in separate vehicles. The officers went towards the residence where the reported disturbance was occurring.

5. Our crew remained in the parking lot. It is usual for us to remain static until notified by the police that the scene is safe.

6. After several minutes had elapsed, and we had not heard from the officers or dispatch, our Lieutenant decided that we should walk to the apartment to check on the situation. Myself, Firefighter Timothy Karschnick, Firefighter Lerry Armstead, and Lt. Donald Hekkers, since deceased, and two AMR ambulance crew members approached and entered the apartment.

7. While on the way to the apartment where the situation was occurring I observed blood on the sidewalk and on the doors of other apartments within the complex. I also noticed the windows were broken out of the apartment and contents from the apartment were thrown outside.

8. When we entered the apartment I announced that we were the Fire Department. I observed that the front door had been broken open, the apartment was in disarray, and blood was everywhere.

9. I proceeded to a bathroom and observed three officers on top of a nude male who was fighting the officers. The male was later identified as Gregory Herring. I observed that Mr. Herring was handcuffed with his hands in front, blood, glass, water and clothes were on the bathroom floor, and Mr. Herring was completely wet from either sweat or water from the floor. The officers were attempting to control Mr.

Herring, however were unsuccessful. Mr. Herring was fighting the officers so hard that the three officers could riot control him.

10. Because Mr. Herring was fighting so hard, and the three officers were unable to control him, firefighter Armstead and I assisted the officers in attempting to restrain Mr. Herring.

11. I felt it was necessary to assist the officers in restraining Mr. Herring for the safety of Mr. Herring, the officers and fire department personnel involved. In addition, the officers were not teeing successful in restraining Mr. Herring to a point where medical assistance could be provided to Mr. Herring. I assisted in attempting to restrain Mr. Herring by physically grabbing and controlling the calf area of Mr. Herring's left leg. The three officers and firefighters were still unable to successfully restrain Mr. Herring.

12. During the struggle an Officer asked if we could give Mr. Herring something to sedate him. At this time AMR paramedic Kevin Collins prepared a syringe of 5 milligrams of Haldol and I observed Mr. Collins administer the Haldol into Mr. Herring's left buttock.

13. Training provided to the Colorado Springs Fire Department paramedics indicates that Haldol given intermuscularly takes up to fifteen minutes to sedate or calm a patient. After receiving the shot of Haldol, Mr. Herring aggressively continued to fight.

14. At this time AMR paramedic Kevin Collins prepared a second shot consisting of 5 milligrams of Valium and handed it to me. I then administered the 5 milligram shot of Valium into Mr. Herring's left buttock. A short time after the second shot was

administered I observed that Mr. Herring began to calm down.

15. The reason that the Haldol and Valium were administered to Mr. Herring was to assist us in restraining Mr. Herring. Haldol and Valium are routinely used as a chemical restraint for the safety of an individual as well as the police officers and firefighters involved. A chemical restraint was also used so that Mr. Herring could safely be removed from the apartment in order for more complete medical care to be provided.

16. I then asked if Mr. Herring was breathing. Officer Darress confirmed that he was and I also observed that he was.

17. The three officers then left the bathroom so that the paramedics could then better evaluate Mr. Herring.

18. We then rolled Mr. Herring onto his back and pulled him towards the doorway in order to allow enough room to better provide medical attention to Mr. Herring. I immediately again checked Mr. Herring's breathing by listening to his breath sounds with a stethascope and determined that Mr. Herring did have strong breath sounds. I then checked for and determined that Mr. Herring also had a strong carotid pulse.

19. A few minutes after the officers had left and we had rolled Mr. Herring onto his back, Mr. Herring stopped breathing. I immediately again checked for a pulse and again confirmed that Mr. Herring did still have a strong carotid pulse: I then immediately began bagging, or ventilating, Mr. Herring, Mr. Herring was then placed on a backboard and rushed to the AMR ambulance. Once at the ambulance I again

checked for a pulse and was unable to detect one and we also immediately began CPR. Mr. Herring was then transported to the Penrose Community Hospital. Upon arrival at the hospital Mr. Herring was immediately taken into the emergency treatment center and attended by hospital staff. Mr. Herring was shortly thereafter pronounced dead by the emergency room physician.

FURTHER AFFIANT SAYETH NAUGHT

Dated this 27th day of July, 2005.

/s/ Clark Gaddie
Firefighter/Paramedic CLARK GADDIE

SUBSCRIBED AND SWORN to before me this 27th day of July 2005, by Firefighter/Paramedic Clark Gaddie.

Witness my hand and official seal.

/s/ Allen Leonard
Notary Public

My Commission expires: 05/24/07

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY LOUIS HERRING,
By and through. CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendants.

AFFIDAVIT OF FIREFIGHTER
LERRY ARMSTEAD

STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

I, Firefighter Lerry Armstead, having been duly sworn upon oath, depose and hereby state as follows:

1. I am a firefighter with the Colorado Springs Fire Department and was employed in that capacity on May 2, 2003.

2. I have personal knowledge of the facts stated herein.

3. On May 2, 2003, a call came into the Colorado Springs Fire Department, Station # 17, to respond to the Winfield Apartments. Upon arrival at the scene we staged ourselves in the parking lot of the apartment complex.

4.After several minutes had elapsed, our lieutenant contacted dispatch to find out if it was clear to enter the apartment. After waiting a short time longer and not hearing back from dispatch our Lieutenant decided that we should walk to the apartment to check on the situation. Myself, Firefighter Clark Gaddie, Firefighter Timothy Karschnick and Lt. Donald Hekkers approached the apartment.

5. As we approached the apartment I observed blood on other apartment doors and on the sidewalk. I could also hear screaming coming from inside the apartment, and I observed that the apartment windows were broken out and debris was scattered everywhere.

6. When we entered the apartment I observed the three officers fighting with a male on the bathroom floor. This individual was later identified as Gregory Herring. Mr. Herring was naked, face down, yelling, cussing and attempting to push himself up off the floor as he fought the three officers.

7. I then attempted to assist the officers in restraining Mr. Herring by grabbing Mr. Herring's ankles.

8. I felt it was necessary to assist the officers in attempting to restrain Mr. Herring because the officers were unsuccessful in restraining Mr. Herring and Mr. Herring needed to be restrained so that medical attention could be administered to Mr. Herring for his safety. In spite of all our efforts we were still unable to successfully restrain Mr. Herring.

9. At this time I observed an AMR paramedic prepare and administer a shot of Haldol into Mr. Herring's left buttock which appeared to have no

effect on Mr. Herring as Mr. Herring continued to fight.

10. I later heard that a shot of Valium was then administered to Mr. Herring. Eventually Mr. Herring began to calm down.

11. After Mr. Herring had calmed down I stepped out of the bathroom area just a few feet away into the bedroom doorway. I then heard Firefighter/ Paramedic Gaddie ask if Mr. Herring was breathing. I heard someone confirm that Mr. Herring was breathing.

12. A short time later I heard Firefighter/ Paramedic Gaddie state that Mr. Herring was not breathing and to get a bag.

14. While Firefighter/Paramedic Gaddie bagged Mr. Herring a backboard was brought in. Mr. Herring was placed on the backboard and then a cot and immediately taken to the AMR ambulance.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 27th day of July, 2005.

/s/ Lerry Armstead
Firefighter LERRY ARMSTEAD

SUBSCRIBED AND SWORN to before me this 27th day of July, 2005, by Firefighter Lerry Armstead.

Witness my hand and official seal.

/s/ Allen Leonard
Notary Public

My Commission expires: 05/24/07

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-CV-02429-PAC-BNB

THE ESTATE OF GREGORY LOUIS HERRING,
By and through, CAROLYN MOORE,
Personal Representative, *et al.*,
Plaintiff(s),

v.

THE CITY OF COLORADO SPRINGS,
a municipal entity, *et al.*,
Defendant(s).

REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, the City of Colorado Springs ("City"), Luis Velez ("Chief Velez"),[1] Gary Darress, Rory Carroll, and Brent Ambuehl, by and through the Office of the City Attorney, and pursuant to Fed.R.Civ.P. 56 hereby submit the following reply brief in support of motion for summary judgment:

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[1] The parties have stipulated to the dismissal of Chief Velez and to Plaintiffs' state law claims.

ARGUMENT

I. THE OFFICERS' ACTIONS WERE OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES. THEREFORE, THEY ARE ENTITLED TO QUALIFIED IMMUNITY.

"In all but the most exceptional cases, qualified immunity protects government officials performing discretionary functions from the burden of civil trials and from liability for damages." *Harris v. Board of Educ. of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997). "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). The plaintiff must then satisfy a "heavy two-part burden." *Id.* "The plaintiff must first establish 'that the defendant's actions violated a constitutional or statutory right.' *Id.* "If the plaintiff establishes a violation of a constitutional or statutory right, he must then demonstrate that the right at issue was clearly established at the time of the defendant's unlawful conduct." *Id.* "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." *Id.* In short, "the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity." *Id.* "Consequently, in order for [Plaintiffs'] claim to survive summary judgment, the record must contain facts that rebut the presumption of the officers' immunity from suit. *Id.* at 1130.

Claims of excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "The reasonableness of an officer's conduct must be assessed 'from the perspective of a reasonable officer on the scene,' recognizing the fact that the officer may be 'forced to make split-second judgments' under stressful and dangerous conditions." *Medina*, 252 F.3d at 1131. The reasonableness of a particular use of force must not be judged with the 20/20 vision of hindsight. *See Graham*, 490 U.S. at 396; *Saucier*, 533 U.S. at 205. "What may later appear to be unnecessary when reviewed from the comfort of a judge's chambers may nonetheless be reasonable under the circumstances presented to the officer at the time." *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005). Therefore, deference is given to the judgment of reasonable officers on the scene. *Saucier*, 533 U.S. at 205.

A. The Officers Were Confronted With An Emergency Situation Giving Rise To Exigent Circumstances. Therefore, The Officers Were Objectively Reasonable In Entering The Apartment.

While Plaintiffs go to great length to establish what an officer should and should not do when confronted with a situation involving a mentally ill person, Plaintiffs merely refer to what should be done in a general sense, if a given situation allows. Response at 5-8. While these general theories involving contact with the mentally ill may be useful in a classroom setting, they are not relevant when determining whether a given officer acted reasonably in a given situation. Each situation is unique and must be examined on its own merits. *See Tennessee v. Garner*,

471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (the question is "whether the totality of the circumstances justifies] a particular sort of . . . seizure"). For purposes of determining the Officers' reasonableness under the circumstances of this case, it is irrelevant as to why Gregory Herring ("Herring") was acting as he did. It makes no difference if Herring was mentally ill, on drugs, or something else. What is relevant is how Herring was acting, i.e., violently and placing himself and possibly others in danger, and what the Officers observed. Under the circumstances, the Officers had to act as they did and were reasonable in their actions.

Plaintiffs claim that a genuine issue of material fact exists as to whether the Officers' warrantless entry was reasonable. Response at 16 and 22. "A fact is material if under the relevant substantive law it is essential to proper disposition of the claim." *Wright v. Abbott Labs, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001). "Only material factual disputes can create a genuine issue for trial and preclude summary judgment." *Faustin v. City and County of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). Further, an ultimate conclusion does not create a genuine issue of material fact. *Medina*, 252 F.3d at 1133. While Plaintiffs contend that the Officers' conduct was unreasonable, that ultimate conclusion does not create a dispute of material fact. In addition, while Plaintiffs omit many of Herring's actions from their recessitation of the facts, what they do recite is consistent with the Officers' statement of facts. Therefore, no factual dispute exists in this case.

Plaintiffs do not dispute that a police officer can lawfully make a warrantless entry when the officer reasonably believes that a person within is in need of

immediate aid. *See Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Plaintiffs merely contend that it was unreasonable for the Officers to believe that someone in the apartment was in need of immediate aid. Response at 16-17 and 22-24.

To support their claim that the Officers were unreasonable in entering the apartment, Plaintiffs refer to some things the Officers knew and did not know. Among the things Plaintiffs list is that the Officers were informed that kids had run from the apartment. Response at 16 and 22. While it is true that the Officers were informed that children had run from the apartment, the Officers were not informed whose children were running from the apartment, how many children ran from the apartment, how many children were initially in the apartment, if Herring's spouse was in the apartment, or if anyone else was in the apartment. Plaintiffs also point out that the Officers had no information anyone else was in the apartment. Response at 16 and 22. Plaintiffs imply that it is unreasonable to act in the interest of someone who may be in danger because it is not 100% known if someone is in danger. The Officers were never informed that only Herring remained in the apartment, or that all the blood they observed was solely from Herring. Officers Carroll and Ambuehl were concerned that others were in the apartment and in need of immediate help. Defendants' Exhibit C, ¶¶31-32; Defendants' Exhibit D, ¶¶34-35. *See Foutz v. City of West Valley City*, 345 F.Supp.2d 1272, 1277 (D.Utah 2004) (officers were objectively reasonable in concluding that a female occupant of an apartment **could have been** seriously injured when provided evidence by neighbors of a disturbance at the apartment and a lack of response from inside the

apartment) (emphasis added); *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999) (merely because officers do not see violence taking place against an individual is not grounds alone to deny immunity).

Plaintiffs also point out that the Officers had no information anyone other than Herring was injured and did not know the nature and extent of Herring's injuries. Response at 17 and 23. While the Officers did not know of injuries other than Herring's, evidence existed to alert the Officers that a dangerous and violent situation was occurring. In addition to Mr. Elder's calls, the Officers observed blood on other apartment doors, the sidewalk, the apartment walls, and all over Herring. Further, the Officers observed broken windows, debris on the ground, and the generally destroyed condition of the apartment. Certainly it was reasonable to conclude that with Herring's presentation, and given all the blood on Herring and in and around the apartment, Herring and possibly someone else was injured and in need of immediate help. *See Fletcher*, 196 F.3d at 49. Regarding the Officers not knowing the nature and extent of Herring's injuries, it certainly cannot be required that police officers ascertain the exact extent of an injury when so much blood and destruction is evident. Confronted with this evidence, the Officers were objectively reasonable in concluding that Herring, children, or someone else in the apartment was in immediate need of help.

Plaintiffs also suggest that the Officers could have continued a non-confrontational dialogue with Herring and obtained a court order to enter if appropriate. Response at 23-24. The Officers could have done as Plaintiffs suggest and continue to allow Herring to harm himself, or whomever may have been in the

apartment. However, police are not required to stand by and wait when they have reasonable concerns for the safety of others. *See Fletcher*, 196 F.3d at 49-50 ("We do not think that the police must stand outside an apartment despite legitimate concerns about the welfare of the occupant, unless they can hear screams. Doubtless outcries would justify entry, but they are not essential." "On the spot reasonable judgments by officers about risks and dangers are protected"). Further, officers are not required to use the least intrusive alternatives available to them. *See Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). "Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." *Id.*

Finally, Plaintiffs state that their expert concludes that the Officers' response was not consistent with recognized police standards. Response at 17. However, as previously stated, an ultimate conclusion regarding an officer's choice does not create a genuine issue of material fact. *Medina*, 252 F.3d at 1133. As in *Medina*, Plaintiffs' expert simply expresses an ultimate conclusion that the Officers' use of force did not conform with recognized police standards and were, therefore, unreasonable. To consider the expert's conclusions would amount to evaluating the Officers' conduct from the 20/20 perspective of hindsight rather than from the perspective of an officer making split-second judgments on scene. *See Id.*

Therefore, the well-settled principle should be followed "that an expert opinion may not be sufficient to overcome summary judgment if it is conclusory and thus fails to raise a genuine issue of material fact.'" *Id.* The general conclusions of Plaintiffs' expert clearly fail to raise a genuine issue of material fact.

Based upon the undisputed facts, the Officers' decision to enter the apartment was reasonable. Therefore, the Officers did not violate a constitutional right of Herring.

B. The Officers' Use Of Force Was Objectively Reasonable Under The Circumstances.

Plaintiffs claim that the Officers' use of force against Herring was unreasonable. Response at 19. While Plaintiffs indicate what the Officers did, Plaintiffs omit what acts of violence Herring used on the Officers. It is not disputed that the Officers used some degree of force on Herring. However, each act of force used by the Officers was in response to the force used by Herring. The totality of the circumstances need to be considered.

The undisputed facts clearly indicate that the physical altercation was intense and that there would have been little time for the Officers to reflect as the situation continued to escalate. Plaintiffs attempt to analyze the incident as if it were composed of distinct and separate segments. At the time, however, it was uncertain what would happen next. The situation was tense and "rapidly evolving." *Graham*, 490 U.S. at 397. The Officers reasonably believed that their safety was threatened as the situation continued out of control. As Officer Darress testified, he was in a fight for his life. Defendants' Exhibit G, Deposition of Gary Darress, p. 113, lns. 14-15.

Herring may or may not have been mentally ill, however that did not make him any less dangerous to the Officers who responded to a neighbor's 9-1-1 call. The Officers had every right to protect themselves with a degree of force likely to restrain. That is what they did. Under the circumstances, a reasonable officer could have believed that the use of force that was deployed was reasonable. *See Caricofe v. Mayor and City Council of Ocean City, Maryland*, 32 Fed.Appx. 62, 67 (4th Cir. 2002) (use of pepper spray initially in a struggle to restrain a violent individual was reasoned, restrained, and reasonable); *Nelson v. County of Wright*, 162 F.3d 986, 988-89, 991 (8th Cir. 1998) (Officer attempted to arrest and handcuff suspect and suspect resisted, creating a physical altercation. Officer hit suspect in the head with a baton several times to control suspect and eventually shot suspect when officer could not control suspect. Officer was found to have acted reasonably). Therefore, the Officers acted reasonably, did not violate any constitutional rights of Herring, and are entitled to qualified immunity.

C. Plaintiffs Have Not Demonstrated That Any Alleged Violation Of A Constitutional Right Was Clearly Established.

The second part of the two-part burden, if Plaintiffs establish that a constitutional right may have been violated, requires Plaintiffs to demonstrate that the right was clearly established at the time of the alleged unlawful conduct. *See Medina*, 252 F.3d at 1128. To survive a motion for summary judgment Plaintiffs must show that the right was "clearly established in a 'particularized' sense." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Plaintiffs "must do more than

identify in the abstract a clearly established right and allege that the defendant has violated it." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). Plaintiffs "must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995). For the law to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

Plaintiffs have identified in the abstract that a warrantless entry and the use of excessive force are constitutional violations. However, Plaintiffs have failed to show that these rights were violated given facts similar to the present case, and have thus failed to show that these rights were clearly established in a "particularized sense." Plaintiffs have failed, as required by the Tenth Circuit, to identify any Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts, demonstrating a clearly established rule prohibiting the Officers from acting as they did. To the contrary, the cases of *Caricofe* and *Foutz* are directly on point and very closely on point to the present case. Based upon these cases, the Officers' actions were reasonable and did not violate any constitutional right. Therefore, the Officers are entitled to qualified immunity.

II. NEITHER THE CITY OF COLORADO SPRINGS NOR ITS EMPLOYEES ENGAGED IN ANY CONDUCT WHICH VIOLATED A CONSTITUTIONAL RIGHT. THEREFORE, LIABILITY CANNOT ATTACH TO THE CITY.

Plaintiffs claim that due to a lack of training the City was deliberately indifferent and thus violated a constitutional right of Herring. Response at 20-21. However, liability does not attached to a municipality pursuant to § 1983 for the acts of its employees unless the plaintiff can prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation. *See Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Meyers v. Oklahoma County Bd. of County Com'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998). "It is well established, therefore, that a municipality cannot be held liable under § 1983 for the acts of an employee if it is found that the municipal employee committed no constitutional violation." *Meyers*, 151 F.3d at 1316. As previously discussed, the Officers did not commit a constitutional violation. As such, liability cannot attach to the City.

In addition, Plaintiffs have not established that any injury came about due to a custom or policy of the City. Instead of alleging that a custom or policy of the City directly led to a violation, Plaintiffs appear to be alleging that the City is liable due to a single incident. Response at 21.

"Ordinarily, '[p]roof of a single incident of unconstitutional activity is not sufficient to impose [municipal] liability.'" *Jenkins v. Wood*, 81 F.3d 988, 994

(10th Cir. 1996) quoting *Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993). "In the case where a plaintiff seeks to impose municipal liability on the basis of a single incident, the plaintiff must show the particular illegal course of action was taken pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued." *Jenkins*, 81 F.3d at 944. *See Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-85, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986); *Butler*, 992 F.2d at 1055 (the plaintiff must prove the single incident wag "caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker"). In the present case, Plaintiffs do not allege that the Officers acted pursuant to any policy or direction from a policy maker. To the contrary, Plaintiffs allege that the Officers acted without calling a supervisor. Here, the Officers were not policy makers, but rather were in a position of patrol officers. Defendants' Exhibit G, p. 4, Ins. 23-24; Defendants' Exhibit H, Deposition of Rory Carroll, p. 4, Ins. 17-18; p. 15, ln. 5; Defendants' Exhibit I, Deposition of Brent Ambuehl, p. 4, Ins. 21-22; p. 11, In. 25, p. 12, ins. 1-2. *See Jenkins*, 81 F.3d at 994 (a field officer does not become a policy maker by simply adopting a particular course of action). Therefore, there is no evidence to indicate a direct causal link between any municipal policy or custom and the violations alleged. As such, the City cannot be held liable based upon a single incident from a non-policy maker.

In addition, Plaintiffs fail to satisfy their burden of proof for a failure to train claim even if a policy maker was involved. To satisfy their burden of proof based on failure to train, Plaintiffs must not only prove that the training was inadequate, but must

also establish the following requirements: (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact; and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. *Carr v. Castle*, 337 F.3d 1221, 1228 (10th Cir. 2003).

Regarding the first factor, as previously discussed, the Officers did not commit a constitutional violation. Therefore, liability cannot attach to the City.

Regarding the second factor, while it may be true that contact between police and mentally ill persons constitutes a usual and recurring situation, that generality is not applicable to the present case. There exist many types and degrees of mental illness. While police, and people in general, may come into contact with people with some degree of mental illness, that does not accurately reflect the contact that occurred in the present case. The type and degree of contact the Officers experienced in this case certainly does not constitute a usual and recurring situation.

As to the third factor, "Rio establish the deliberate indifference element of their claim, Plaintiffs must show that the City's action or inaction demonstrates a conscious disregard for constitutional protections." *Fuston-Lounds v. Torres*, 2005 WL 1950349, 5 (W.D. Okla.). "The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to

disregard the risk of harm." *Carr*, 337 F.3d at 1229. "Moreover, a finding of 'deliberate indifference' in this situation requires a showing that 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Id.*, quoting *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989).

Plaintiffs provide no evidence that the City was on notice that the type of extreme situation as occurred here had previously occurred. Further, Plaintiffs provide no evidence the City made any such deliberate choices regarding training. Instead, Plaintiffs merely allege ways in which they contend the Officers were inadequately trained without offering any evidence of knowledge of the purported deficiencies on the part of the City. *See Carr*, 337 F.3d at 1229.

Plaintiffs offer the opinion of their expert who criticizes the training by opining that more training should have been provided regarding the mentally ill, and concludes that the City acted with deliberate indifference. Response at 20. However, "those assertions merely demonstrate the omniscience of hindsight" *Id.* at 1230. *See also Fuston-Lounds*, 2005 WL 1950349 at 6. In Carr, plaintiff's expert also opined that the officers were not trained properly regarding the recognition and proper handling of emotionally disturbed persons, and that the officers did not approach the emotionally disturbed person cautiously and non-confrontationally enough. *Carr*, 337 F.3d at 1225-26 and 1230. "But the fact that someone with the opportunity to prepare an expert report at leisure opines that well-trained officers would have per-

formed differently under pressure does not rise to the legal standard of deliberate indifference on the part of the City for [plaintiff] fails to point to any evidence placing the City on actual or constructive notice that the asserted failures to train were substantially certain to result in a constitutional violation." *Id.* at 1230. Plaintiffs fail to show that the City had actual or constructive notice that the alleged failures to train were substantially certain to result in a constitutional violation. As such, the City was not deliberately indifferent.

Regarding the fourth element, Plaintiffs must establish a direct causal link between the alleged improper training and the harm resulting to Herring. "To do so, they must submit evidence showing that the identified deficiency in training was so 'closely related' to the ultimate injury that it 'actually caused the constitutional violation.'" *Fuston-Lounds*, 2005 WL 1950349 at 7, quoting *Carr*, 337 F.3d at 1231. Plaintiffs have identified nothing regarding training that can be said to have led directly to Herring's injuries. "[I]t is not enough to argue that an officer was not trained to know how to react to a specific factual scenario; instead, plaintiffs must show that the officer was trained to act in such a reckless or incorrect manner that their training caused the harm." *Fuston-Lounds*, 2005 WL 1950349 at 7. *See Carr*, 337 F.3d at 1231. In this case, Plaintiffs have not presented any evidence to show that the Officers were trained to use excessive force in the circumstances presented. Therefore, Plaintiffs have not shown the requisite causal link between the purported inadequate training and the harm suffered by Herring. As such, Plaintiffs' claim against the City cannot stand.

III. THE OFFICERS' CONDUCT DID NOT RISE TO THE LEVEL NECESSARY TO SHOCK THE CONSCIENCE.

Plaintiffs claim that a reasonable jury could find that the Officers' conduct shocked the conscience. Response at 20. However, to demonstrate conscience shocking behavior Plaintiffs must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscious shocking." *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995). Given the totality of the circumstances, it cannot be said that the Officers' conduct was so outrageous to even remotely approach conscience shocking behavior. To the contrary, the Officers' conduct was reasonable.

IV. THE OFFICERS DID NOT INTEND TO INTERFERE WITH PLAINTIFFS' PERSONAL RELATIONSHIP.

Plaintiffs claim that the Officers' conduct constituted a deprivation of familial companionship. Response at 24. However, "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under §1983." *Trujillo v. Board of County Com'rs of Santa Fe County*, 768 F.2d 1186, 1190 (10th Cir. 1985). Plaintiffs acknowledge this requirement of intent. Response at 24. While Plaintiffs do not contend that the Officers intended to interfere with any relationship, Plaintiffs nevertheless argue that an allegation of reckless conduct is sufficient to satisfy the intent requirement. *Id.*

In *Trujillo*, the court found that the alleged conduct by the state will constitute an unconstitutional deprivation of the freedom of intimate association

only if the conduct was directed at that right. *Trujillo*, 768 F.2d at 1190. *See Trejo v. Wattles*, 636 F.Supp. 992, 996-97 (D.Colo. 1985) (the court distinguished where there is direct intent to deprive and a transferred intent to deprive). Since there is no evidence the Officers directed their conduct at the relationship, the Officers' conduct regarding Herring cannot be transferred to the Herring children. Therefore, without an intent to interfere with the relationship the Officers' conduct, even if reckless, cannot support a deprivation of familial association claim. *See Hill v. Martinez*, 87 F.Supp.2d 1115, 1119 (D.Colo. 2000) (Plaintiffs claimed that defendant's conduct was in "reckless disregard" of their rights to familial association. Court found that a "Fourteenth Amendment claim based on familial association must be based on specific intent to interfere with that association." The allegation of reckless disregard did not establish defendant acted with the requisite intent); *Beck v. Calvillo*, 671 F.Supp. 1555, 1558 (D.Kan. 1987) (Plaintiff alleged the acts and omissions of defendant were grossly negligent and carried out with such recklessness and wanton disregard and intentional and deliberate interference. Court found that this type of conduct did not constitute an unconstitutional deprivation of the right of familial association because there were no allegations that such an intent was directed at the plaintiffs). Therefore, Plaintiffs' deprivation of familial companionship claim cannot stand.

It is a well-settled principle that standing to assert a § 1983 claim requires a plaintiff to assert a violation of a constitutional right personal to the plaintiff and not the right of someone else. *See Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990). *See also Dohaish v. Tooley*, 670 F.2d 934, 936 (10th Cir.

1982) ("It is quite true that there is also a lack of standing. When we say standing, we mean that the §1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased"). "Accordingly, Plaintiffs must allege a police deprivation directed at themselves and not decedent." *Murphy v. Bitsoih*, 320 F.Supp.2d 1174, 1185 (D.N.M. 2004). As such, only the estate of the deceased may bring a § 1983 action for a violation of decedent's rights. In *Berry v. City of Muskogee*, 900 F.2d 1489, 1506-07 (10th Cir. 1990) the court stated that a §1983 wrongful death claim "should be a survival action, brought by the estate of the deceased victim, in accordance with §1983's express statement that the liability is 'to the party injured.'" Therefore, the estate of Herring is the proper party to bring the §1983 action. Since no deprivation of familial companionship claim lies, the Herring children are no longer proper party plaintiffs to this action.

WHEREFORE, for the foregoing reasons, as well as the reasons set forth in Defendants' Opening Brief, it is respectfully requested that this Honorable Court enter an order granting Defendants' Motion for Summary Judgment, and dismiss Plaintiffs' complaint with prejudice, and for any other relief as this Court deems appropriate.

Dated this 31st day of October, 2005.

Respectfully submitted,

PATRICIA K. KELLY
City Attorney/Chief Legal Officer
Reg. No. 014408

/s/ Shane M. White
SHANE M. WHITE
Senior Attorney
Reg No. 019034
Colorado Springs City Attorney's Office
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Attorneys for Defendants City of Colorado Springs, Chief of Police Luis Velez, Gary Darress, Rory Carroll and Brent Ambuehl

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB))

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L Herring; GREGORY L. HERRING, a minor child by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a Minor child, by and through his Guardian Ad Liters, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, In his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, and in his capacity as a Colorado Springs Peke Officer,

Defendants,

DEPOSITION OF GARY DARRESS

October 6, 2005

Scheduling Attorney for the Plaintiffs:

MR. ROBERT J. FRANK, ESQ.
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219 West Colorado Avenue, Suite 200
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Atty Reg. No. 19765

For the Defendants:

MR. SHANE WHITE, ESQ.
City of Colorado Springs
30 South Nevada Avenue, Suite 501
Colorado Springs, CO 80903
(719) 385-5909

Also Present:

Allen Leonard
Carolyn Moore
Susan Fort

PURSUANT TO NOTICE, the deposition of GARY DARRESS was taken on behalf of the Plaintiffs, pursuant to the pertinent Federal Rules of Civil Procedure, at 9:25 a.m., this date, at 219 West Colorado Avenue, Suite 200, Colorado Springs, Colorado, before Wendy Renfrow, Notary Public and Registered Professional Reporter, State of Colorado.

* * * *

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[4] GARY DARRESS, the deponent herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. FRANK:

Q. Would you please state your name and spell your last name for the record?

A. My name is Gary Darress. My last name is spelled D-a-r-r-e-s-s,

Q. What is your current occupational address?

A. Excuse me?

Q. What is your current occupational address?

A. 705 South Nevada Avenue in Colorado Springs, Colorado.

Q. And who is your current employer?

A. City of Colorado Springs.

Q. And what division of the City of Colorado Springs do you work for?

A. I work for the police department.

Q. And what is your current job title?

A. I am a patrolman.

Q. And when did you first become employed

* * * *

[113] thumb, I believe.

Q. And with what type of force were you pushing down?

A. I believe same force was involved. I can't tell you how hard, how soft, but I thought I was doing it quite hard.

Q. Okay. Was that a technique that you were trained in at any time during your law enforcement career?

A. No.

Q. Where did you learn to do that?

A. That was a reaction to having a physical fight, a physical altercation with an individual that was not calming down. That was a fight for my life. I was afraid if he got up and he was out of our control he would have hurt myself or one of those other two officers. That was an instinctive move.

Q. Okay. So it wasn't a trained pressure or pain control technique, it was a reaction by you to the situation at hand?

A. Yes.

Q. Okay. Then what happened?

A. Where do you want me to begin again? I can't recall where I left off.

[114] Q. That's fine. You're pressing your thumb into Mr. Herring's neck. Where were you in relation to his body at that time?

A. I believe I was still on his back, on the upper right corner of his back and his shoulder.

Q. And where was Officer Carroll at that point?

A. Still off to my left side.

Q. And do you know where Officer Ambuehl was at that time?

A. No, I do not.

Q. For how long did you push?

A. 30 seconds or so.

Q. What happened then, after you pushed on the neck?

A. Still Continuing to fight with him and he was fighting with us. No was not calming down. Somewhere in that fight I got on the radio and asked for more assistance inside, knowing the fire department personnel were outside. I felt that we were losing control of the situation. He was not calming down with—I know myself and Officer Carroll were still trying to get that right arm under control. I didn't know where Officer Ambuehl was.

[115] I felt with more people there we would be able to subdue him and then, again, we could get the medical attention he needed, you know, to the injuries, to the way he was acting. I got no response from the dispatcher. Nobody came in. We're still trying to fight with him.

Eventually, after he bit Officer Carroll, after he bit me, he grabbed my groin, we were able to get his right arm handcuffed. The handcuffs were not behind his back but in front of him. And we're still asking him to calm down. Still trying to calm him down. Still trying to figure out what's going on here to get him the medical attention that he needed. I was on his back. He is doing push-ups with me on his back. I'm a 170-pound man with 20 pounds of gear on my belt, about 190 pounds, and he is doing push-ups with me an his back.

Q. At one point in the tape you use the term "jumping up and down on the back," but then you clarified that it wasn't like you were standing jumping up and down on the back, but rather its my understanding you were kneeling on him trying to apply a downward pressure. Is that correct?

A. Yes. So he would not get up on his [116] feet.

Q. When you were kneeling on him applying the downward pressure, were you kneeling on him with your knees, your shins, your feet? What was your body position at that point?

A. I believe with my—I would say. At least my right—or, excuse me, any left knee, because that was on the right side of his back and my other knee might have been there, it might have been off of his body, but I'm trying to apply this pressure, as you say, to keep him down.

Q. Where on his back was your knee? Was it in the middle of his back, right, left?

A. It was up on his right shoulder at an angle.

Q. Okay. Who actually was able to get both hands cuffed, was that you or Officer Carroll?

A. Myself. Officer Carroll got the left hand cuffed and then a couple minutes after that it seemed like, or what have you, whatever time period went by, I got the right hand cuffed.

Q. What happened at that point?

A. I believe eventually the medical people walked in, either at the same time, or the Colorado Springs Fire Department walked in and then AMR

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB))

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L Herring; GREGORY L. HERRING, a minor child by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a Minor child, by and through his Guardian Ad Liters, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, In his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, and in his capacity as a Colorado Springs Peke Officer,

Defendants,

DEPOSITION OF RORY CARROLL

September 21, 2005

Scheduling Attorney for the Plaintiffs:

MR. ROBERT J. FRANK, ESQ,
The Law Firm of Robert J. Frank &
Associates, L.L.C.
219 West Colorado Avenue, Suite 200
Colorado Springs, CO 80903
(719) 329-1100
Atty. Reg. No. 19765
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September 21, 2005

For the Defendants:

MR. SHANE WHITE. ESQ.
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30 South Nevada Avenue,
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(719) 385-5909

Also Present:

Allen Leonard
Carolyn Moore

PURSUANT TO NOTICE, the deposition of RORY CARROLL was taken on behalf of Plaintiffs, pursuant of the Federal Rules of Civil Procedure, at 219 West Colorado Avenue, Suite 200, Colorado Springs, Colorado, this date at 9:05 a.m. before Sandi K. Pelton, RPR, RMR, CRR, and Notary Republic.

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* * * *

[4] WHEREUPON, the following proceedings were had:

RORY CARROLL, the deponent herein, having been first duly sworn to state the whole truth, testified on the oath as follows:

EXAMINATION

BY MR. FRANK:

Q. Sir, would you please state your name and spell your last name?

A. My name is Rory Carroll, C-a-r-r-o-l-l.

Q. And what is your current occupation address?

A. Occupation address is 705 South Nevada Avenue, Colorado Springs, Colorado.

Q. Who is your current employer?

A. Colorado Springs Police Department, City of Colorado Springs.

Q. And what is your current job title?

A. Police officer,

Q. When did you first become a police officer with the Colorado Springs Police Department?

A. August 9th, 2000.

Q. Officer, my name is Robert Frank. I represent the plaintiffs in an action brought against the City of Colorado Springs and certain of its officers relating to the death of Gregory Herring. I am going to be asking you questions

* * * *

[13] Q. When did you begin work at District 11?

A. The summer of '98.

Q. What did you do between '97 and '98?

A. I went back to work at the Citadel security for about seven, eight months.

Q. Whet were your responsibilities as a District 11 security patrol officer?

A. For the most part worked midnight shifts, and I would actually patrol all the school properties, answer alarm calls, contact anybody who was on school properties after 9:00 at night.

Q. Did you receive any training regarding contact with the mentally ill in that position?

A. No.

Q. When did you leave District II?

A. Beginning of 2000 when I got hired by state patrol.

Q. Aside from attending the training program for the Colorado State Patrol, did you ever work as a Colorado State Patrol office.

A. No.

Q. How is it that the Colorado Springs Police Department hired you away from the Colorado State Patrol?

A. They like to do that.

Q. Is that a typical course of conduct?

[14] A. It is actually who I wanted more and I still tested with them.

Q. While in the 15-week program with the Colorado State Patrol, did you receive training on contact with the mentally ill?

A. No.

Q. I have had a number of cases against the Colorado State Patrol, Officer, and I have asked questions about training as it relates to contact with disabled people. And it is my understanding that Colorado State Patrol officers do receive such training, but I don't know whether it is in their 15-week program or whether it is in-service training. During your 15-week program at Colorado State Patrol, did you receive any training as it relates to contact with the mentally ill?

A. No.

Q. How about disabled persons in general?

A. No.

Q. And when did you actually become a Colorado Springs police officer?

A. First day at the police academy was August 9, 2000.

Q. I have that right in my notes. Thank you for answering that again. Have your positions or job responsibilities as a Colorado Springs police officer [15] changed since you became an officer?

A. No.

Q. What are your—what are your responsibilities as a CSPD officer?

A. I am a patrol officer. I answer calls for service, I am at the discretion of the dispatchers, and I look for crimes in progress, officer-initiated activities.

Q. What does it mean to be at the discretion of the dispatchers. That almost sounds ominous.

A. It means if there is a call for service, they decide who goes, which officers, how many officers. We answer calls for service.

Q. Can you please tell me how the dispatch process works at the CSPD?

A. I cannot.

Q. Let me then take it from the other end, which is as an officer. When dispatch wants to exercise their discretion and send you someplace, how do they tell you that?

A. They call your call sign. If I am Adam 53, they will call 2 Adam 53 over time radio. I then respond. After I respond, they give me the address, the person who is calling, the reason they are calling, any other witnesses or contacts I may need to contact. Once they are done with that, I acknowledge by saying 2 Adam 53 copy. At that [16] point, they give me the time that I copied.

Q. There is also a computer system in your car; is that correct?

A. Yes.

Q. What information do you receive over the computer system versus over the radio?

A. That is information basically that the call taker may be adding in, whoever is answering the 911 call or the 7000 line call. Sometimes it is exactly what the diapatcher gives us, sometimes it is not.

Q. So, Officer, if I can make sure that I understand what you are telling me, is that when dispatch receives information that they believe in their discretion requires an officer contact, you are contacted by radio and given information. And information is also given to you via the computer. That information may be in addition to or may be duplicative of the information you received by radio?

A. Yes.

Q. Would it be a fair characterization that the information you received either by radio or by computer is intended to give you as an officer as much

information as possible when you are responding to a scene?

A. Yes.

Q. Would you agree that as an officer, when you are responding to a scene, you do your best to make sure

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB))

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L Herring; GREGORY L. HERRING, a minor child by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a Minor child, by and through his Guardian Ad Liters, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, In his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, and in his capacity as a Colorado Springs Peke Officer,

Defendants,

DEPOSITION OF BRENT AMBUEHL

September 22, 2005

Scheduling Attorney for the Plaintiffs:

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For the Defendants:

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Colorado Springs, CO 80903
(719) 385-59D9

Also Present:

Allen Leonard
Carolyn Moore

PURSUANT TO NOTICE, the deposition of BERENT AMBUEHL was taken on behalf of the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, at 219 West Colorado Avenue, Suite 200, Colorado Springs, Colorado, this date at 9:00 a.m., before Saudi K. Pelton, RPR, RMR, CRR, and Notary Public.

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6. Narrative of Interview 116

* * * *

[4] WHEREUPON, the following proceedings were had:

(Ms. Moore is not present at this time.)

BRENT AMBUEHL, the deponent herein, having been first duly sworn to state the whole truth, testified on the oath as follows:

EXAMINATION

BY MR. FRANK:

Q. Would you state your name and spell your name for the record?

A. Brent Ambuehl, A-m-b-u-e-h-l, common spelling of Brent.

Q. And what is your current occupational address?

A. 7850 Goddard, G-o-d-d-a-r-d, Street.

Q. And what is the zip there?

A. 809—I believe it is — 20.

Q. And just for the record, that is in Colorado Springs?

A. It is in Colorado Springs,

Q. Who is your current employer?

A. Colorado Springs Police Department.

Q. And what is your current job title?

A. Police Officer.

Q. And when did you first become a police officer with the Colorado Springs Police Department?

A. December '02. December 2002.

* * * *

[9] Q. Where did yon work?

A. Just local jobs in New Mexico. I went to a semester of school.

Q. What were you studying in School?

A. At the that it was just general studies.

Q. And the kind of work you did, was it in any way related to law enforcement or security?

A. No.

Q. What did you do in the Air Force?

A. I was an F-16 crew chief.

Q. Did you have any training in military policing in the Air Force?

A. No.

Q. When did you leave the Air Force?

A. Probably December — actually January 2001.

Q. And what did you do between January, 2001 and August of 2002?

A. Employed at the Air Force Academy.

Q. And what did you do out there?

A. Human relations training.

(Ms. Moore enters the room.)

MR. FRANK: Let's take a brief break.

(Brief recess.)

BY MR. FRANK:

Q. What is human relations training?

A. Human relations training is dealing with, it is pretty broad, but dealing with ethnicity, character, integrity.

Q. Is your answer complete?

A. Yes.

Q. Were you a human relations trainer?

A. I was a human relations trainer, yes, at the Air Force Academy.

Q. Where did you receive your training in human relations?

A. At the Air Force Academy.

Q. So, here is where I am having a little bit of difficulty, Officer. I know you were an F-16 crew chief, and then at some point you left that position and you went into human relations training. Was there a period of time after which you left the Air Force that they trained you to be a trainer and then you subsequently went into that position?

A. Yes. Let me step back. That was my primary job in the Air Force was an F-16 crew chief. After I left that career field I became a cadet counselor out at the Air Force Academy. Which worked with the human relations, which helped me with my education with human relations training.

Q. Thank you.

A. That was my primary job in the Air Force. I [11] apologize for not being clear.

Q. That's fine. That is why I asked the follow-up. During your training in human relations, did you receive any training as it relates to dealing with the mentally ill or special needs people?

A. No.

Q. As a human relations trainer, did you receive any training of the ADA, the Americans with Disabilities Act?

A. No.

Q. Do you know the number of your training academy?

A. The number—

Q. Yes, Every training academy has—at least as near as I can figure, Officer, a number, And I believe that you were in the 43rd—

A. 43rd recruit class.

Q. That is what I was trying to confirm. Thank you. Has your position as an officer changed from the, time that you were employed: With the CSPD to current?

A. I don't understand your question,

Q. Okay. My understanding, as a police officer, one can be assigned to patrol, one can be assigned to various and sundry other divisions as one progresses through the ranks,

A. No, it hasn't.

Q. So, you started as a patrol officer and you [12] continue to be a patrol officer?

A. Correct.

Q. I saw the way you were dressed and I was wondering whether you were a young detective.

A. No. Not yet.

Q. The recruitment academy that you went through, that is an 18-week program?

A. I cannot recall the weeks. I want to say it was 22. But I am not sure.

Q. After that recruit program, did you have any other training?

A. Right into police training officer out on the streets.

Q. And that is a three-and-a-half-month program?

A. Right now it is—I believe it is 15 weeks.

Q. Was it 15 weeks when you took it?

A. It was the full extent of the training program, whatever weeks it was.

Q. And you have daily roll call briefings?

A. Yes.

Q. And you have periodic in-service training days; is that correct?

A. Yes.

Q. How many per year?

A. I believe three.

* * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING, by and through, Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, Individually and in his capacity as a Colorado Springs Police officer,

Defendants.

Magistrate Judge Patricia A. Coan

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Come the Plaintiffs, by and through counsel, and hereby submit their brief in response to Defendants' Motion for Summary Judgment.

I. INTRODUCTION

Two primary issues are raised in Defendants' Motion for Summary Judgment:[1] 1) Is there a genuine issue of material fact regarding the reasonableness of the conduct of Colorado Springs police officers in escalating conflict and using lethal force with an unarmed mentally ill man who was alone in his own home, who had expressed his fear of police officers, who posed no risk to the public or other officers, and who was actively speaking with CSPD officers at the time they chose to escalate to the use of violence; and 2) Is there a genuine issue of material fact as to whether the training given the officers by the Colorado Springs Police Departments was so miniscule as to constitute deliberate indifference. Material issues of fact as to these issues preclude summary judgment.

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[1] While other issues remain, these two are primary. The parties have stipulated to dismissing Defendant Velez in his individual and official capacities (Section V and Section VI of Defendants' Motion for Summary Judgment) as well as to dismissing Plaintiffs' state law claims (Section VI of Defendants' motion for Summary Judgment. Claims of Excessive Force, City liability, Warrantless entry, and familial companionship remain.

II. FACTS

A. Contact With The Mentally Ill Is Reasonably Foreseeable.

Mr. Herring died in the custody of the Colorado Springs Police Department (hereinafter referred to as CSPD) on May 3, 2004. Since at least 1997, the 10th Circuit has recognized that police officer contact with the mentally ill is a common, usual and recurring situation for police officers. *Allen v. Muskogee,* 119 F.3d 837, 842 (10th Cir. 1997). For decades the accepted standard of care required police officers to recognize and train for contact with the mentally ill. (Affidavit and Report of W. Ken Katsaris, Plaintiff's police policy and training expert, p. 4, ¶2, attached hereto as Exhibit H).

As of 2003, the CSPD recognized officer contact with the mentally ill was a foreseeable part of police work in the City of Colorado Springs. (Deposition of Luis Velez, Chief of Police, City of Colorado Springs Police Department, September 9, 2005, 67:8-13, attached as Exhibit A) Police officers are often times "first responders" when there is an issue of mental illness. (Exhibit A, 67:14-18; Deposition of Colorado Spring Police Officer Gary Darress, October 6, 2005, 25:21-25, attached as Exhibit B; Deposition of Colorado Springs Police Officer Rory Carroll, September 21, 2005, 25:18-21, attached as Exhibit C; Deposition of Colorado Springs Police Officer Brent Ambuehl, September 22, 2005, 32:16-19, attached as Exhibit D)

In the past five or six years (prior to 2003) the CSPD has had more frequent contact with the mentally ill than ever before. (Exhibit A, 67:14-68:11) There are approximately 50,000 mentally ill persons in Colorado Springs out a population of 400,000.

(Exhibit A 76:9-77:3; see also Exhibit D 34:11-17) Officer Darress indicates that in his law enforcement career he has contacted a "couple of hundred" persons he assessed to be suffering a mental illness. (Exhibit B 27:1-28:10) Office Carroll estimates 15% of his calls for service relate to the mentally ill. (Exhibit C 26:3-7) Officer Ambuehl agrees 15% is a reasonable estimation. (Exhibit D 34:3-10)

B. As Of May 2003 Colorado Springs Police Officers Received Little Training Relating To Contact With The Mentally Ill.

Despite Colorado Springs' large mentally ill population and the significant number of police contacts, CSPD officers are given little training or guidance in recognizing or responding to calls involving the mentally ill. (Exhibit H p. 5 ¶4). Police agencies have an obligation to provide their employees with the policies, training and tools necessary to accomplish their mission. (Exhibit A 102:13-103:2) Part of the obligation to train officers is to protect the public from the risks that could occur if officers are not properly trained. (Exhibit A 104:7-11; Exhibit B 29:2-25).

A reasonable police department will give its officers training on the proper methods to safely contact a person suffering from mental illness. (Exhibit A 77:16-21) This training is to give the officer those "tools required to make decisions" as to how their interaction with a member of the public is "likely to escalate or deescalate the circumstance when faced with the mentally ill or somebody undergoing a behavioral crisis." (Exhibit A 75:7-18; see also Exhibit B 28:11-22) While Chief Velez believes the CSPD has a policy on mental illness, he could not

identify the number of the special order containing the policy nor could he describe the contents of the policy. (Exhibit A 135:1-21). No such policy or special order containing said policy was tendered by the Defendants in response to discovery. While Chief Velez believed there to be a roll call training video relating to contact with the mentally ill, he could not specifically identify the video or confirm it was shown to officers prior to May 2003. (Exhibit A 46:25-47:8) No video was produced by the Defendants in discovery. Officer Ambuehl "vaguely" remembers such a video being shown after the incident with Mr. Herring. (Exhibit D 61:3-9)

CSPD officers are given a total of 947 hours of initial training. (Exhibit A 13:214:20). Officer Darress only received 2 hours of initial training on contact with the mentally ill. (Exhibit B, 21:1-19). He could not recall the content of this training. (Exhibit B 21:20-22). Officer Darress could not recall having any other training relating to the mentally ill from the time of his initial training until September 20, 2004.[2] (Exhibit B 25:1-6) He indicated that there is no General Order or standard operating procedure that gives CSPD officers specific guidelines as to how to deal with differing mental illness. (Exhibit B 13:2-10) None of the responding officers were given training

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[2] In September of 2004, Officer Darress participated in crisis intervention training (CIT) training. This training was not offered to him prior to May of 2003. (Exhibit B 30:1-8) Officer Darress indicates this training gave him better information on protecting mentally ill persons he contacts, the public and himself. (Exhibit B 35:9-36:20) Officer Darress indicated he would have liked to have had this training at the time he had his interaction with Mr. Herring. (Exhibit B 36:21-24)

on how OC sprays affect the mentally ill. (Exhibit B 63:11-13; Exhibit C 121:14-24)

Officer Carroll recalls having a single day of training in his initial academy relating to the mentally ill. (Exhibit C 33:2-9). Of this day, four hours were spent in the classroom, one and half hours were spent on scenario training, and two hours on unrelated physical training. (Exhibit C 34:15-24) The training relating to the mentally ill was combined with training relating to other special populations such as the elderly or disabled. (Exhibit C 37:4-11) Officer Carroll could not recall any specific training he had relating to contact with the mentally ill in either his initial on the job training or daily briefings. (Exhibit C 82:13-17; 83:1-5).

Officer Ambuehl indicates he had four hours of academy training relating to special populations, some of which related to interacting with the mentally ill. (Exhibit D, 20:12-22:10). He had some additional scenario training but cannot specifically recall scenario training relating to the mentally ill. (Exhibit D 23:2-18) From the time he completed his academy training, Officer Ambuehl had no training on dealing with the mentally ill until June 14, 2004.[3] (Exhibit D 25:10-13).

C. Reasonable Police Officers Must Recognize And Respond Appropriately To Calls Involving The Mentally Ill.

Among the assessments and judgments an officer must make in arriving on a scene is whether the

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[3] On June 14, 2004 Officer Ambuehl participate in Crisis Intervention Training. He indicated that after this training he would possibly have handled the Herring situation differently, now being better trained. (Exhibit D 95:8-14)

person being contacted is "suffering from some type of crisis or behavioral disturbance or mental illness." (Exhibit A 73:11-17, Exhibit B 26:21-27:1) The way in which an officer reacts to a situation involving a mentally ill person is "paramount in either resolving a crisis effectively or escalating an already volatile situation." (Exhibit A 85:23-86:2) An officer must consider how their actions will escalate or de-escalate the conflict. (Exhibit A 74:25-75:6) Part of an officer's role, particularly in relation to the mentally ill is to deescalate the situation. (Exhibit C 54:6-15; Exhibit D 39:13-16) An officer should attempt to de-escalate before the use of force. (Exhibit C 57:7-10).

The mentally ill may react differently to officers than do other members of the public. (Exhibit A 79:4-6). Mentally ill persons may not be able to understand or appreciate officer commands. (Exhibit A 113:2-6; Exhibit C 42:11-15). The mentally ill may be unable to respond to officer commands. (Exhibit C 42:11-15; Exhibit D 58:12-16) When choosing how to react to a situation an officer must consider, as part of officer safety and safety of the public, how their actions are going to affect a mentally ill or behaviorally disturbed person. (Exhibit A 75:19-25)

Fear of police officers is a common characteristic of the mentally ill. (Exhibit H p. 4 ¶2). In contacting the mentally ill, officers must consider a mentally ill persons potential fear. (Exhibit C 44:4-13; Exhibit D 49:3-18) Often, the mentally ill will find the authoritative posture and body language of an officer threatening. (Exhibit A 78:243; 117:2-7) The display of a defensive posture or a defensive weapon may affect a mentally ill person differently than other persons and must be considered by the officer. (Exhibit A 120:24-121:10)

When dealing with the mentally ill, an officer should not move suddenly, give orders rapidly or shout. (Exhibit C 72:1-9; Exhibit D 47:13-48:2). These actions will often increase the fear felt by a mentally ill person. (Exhibit C 72:6-9) Kicking in a door constitutes a sudden, aggressive act. (Exhibit C 72:21-73:3; Exhibit D 48:348:14).

An officer should not crowd the mentally ill person or move into their personal buffer zone of comfort (Exhibit C 73:4-9). Officers should avoid getting in close proximity to a mentally ill person in small spaces such as bathrooms or hallways. (Exhibit C 73:12-74:4). Officers should call persons who have training with the mentally ill or negotiation if they have time to do so. (Exhibit A 114:22-115:9) Chief Velez would be critical of an officer who failed to utilize the least violent option available relative to a situation. (Exhibit A 115:16-20). In contacting the mentally ill, it is important to maintain a verbal dialogue with the person. (Exhibit B 48:11-20; Exhibit D 49:19-23; 52:6-15) Maintaining a dialogue allows the officer to deescalate the situation. (Exhibit B 49:3-14)

When contacting a mentally ill person, an officer must consider the persons personal history. (Exhibit C 46:3-16) This includes prior police contacts with the person. (Exhibit C 46:17-20; Exhibit D 45:8-19) An officer should attempt to contact friends and family members regarding the person's history if there is time to do so. (Exhibit C 47:12-24; Exhibit D 35:8-19).

When considering whether a mentally ill person may act in a dangerous fashion, an officer must consider whether the person can be readily observed by law enforcement (Exhibit C 51:7-11), whether the

person had the ability to harm someone before officers arrived but did not take that opportunity (Exhibit C 51:12-16), whether the person was acting violently toward property rather than people (Exhibit C 51:17-52:5), and whether the person is exercising self control (Exhibit C 52:6-53:10). People with mental illness who are aggressive or who make violent threats often feel threatened themselves and can actually become violent when they feel they are cornered. The police may diffuse a potentially dangerous situation by being patient. (Exhibit C 70:5-17).

An officer must understand that he/she may not have a rational conversation with the mentally ill person. (Exhibit C 75:7-10) The officer must recognize that the person may be overwhelmed by thoughts, frightening beliefs, sounds, or the environment. (Exhibit C 75:11-17). Mr. Herring was overwhelmed by thoughts, frightening beliefs, sounds, and the environment at the time of his contact with the CSPD. (Exhibit C 75:18-21). Failure to follow police directions during a psychotic episode is likely not a deliberate act. (Exhibit C 77:5-8). When an officer is unable to determine if behavior is from drug use or mental illness he must assume it is from mental illness. (Exhibit C 80:14-16; Exhibit D 33:19-34:2 (mental illness "always in my head" when dealing with behavioral disturbance.))

D. The Officers' Escalation To Lethal Force Was Unreasonable Given The Totality Of The Circumstances.

The initial dispatch of officers to the Herring residence was sufficient to put a reasonably trained officer on notice he/she was contacting a mentally ill person. (see CSPD dispatch logs attached hereto as

Exhibit E4) The officers were informed: 1) a reporting party was inside his apartment with a neighbor outside banging on the front door (Exhibit E 14:34:25, Exhibit B 70:2-13 Exhibit C 110:15-18); 2) no weapons were involved (Exhibit E 14:34:30, Exhibit B 70:15-18; Exhibit C 111:3-112:4); 3) the altercation was a verbal rather than a physical altercation (Exhibit E 14:34:34, Exhibit B 71:4-16; Exhibit C 112:5-17); 4) the suspect was Greg Herring, an African American male, six foot two inches tall weighing 240 pounds (Exhibit E, Exhibit C 112:25-113:16); 5); the initial report was of no injury (Exhibit E 14:36:11, Exhibit B 71:17-72:2 Exhibit C 114:8-115:3), 6) the suspect lives in apartment north of the reporting parties (Exhibit E, Exhibit C 115:13-16), 7) "Kids now running away from the apartment. Containers and furniture being thrown out of the apartment." (Exhibit E 14:36:51, Exhibit B 72:3-7; Exhibit C 115:17-25); 8); Greg is now nude, in his own apartment with bleeding alms (Exhibit E 14:41:15, Exhibit B 73:18-21; Exhibit C 116:22-25; Exhibit D 69:25-70:2); second notification from dispatch (third overall notice) that the children had fled the apartment. (Exhibit E 14:49:05; Exhibit B 73:23-74:10)

Officer Darress was the first officer present on the scene. Upon arrival Officer Darress spoke with a third party who directed Officer Darress to Mr. Herring's first floor apartment, and told Officer Darress the children had left the apartment. (Exhibit B 72:22-73:7; 78:17-79:22) As Officer Darress ap-

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[4] All numbered references associated with Exhibit E are time index references. As an example time index 14:25:05 means 2:25 p.m. and 5 seconds. The relevant portions of Exhibit E have been highlighted for the Court's convenience.

proached Mr. Herring's apartment he noted the windows had been broken out and personal property items were on the ground near the windows. (Exhibit B 89:5-14) Officer Darress came to a window on the East side of the complex and contacted a nude black man who was bleeding from his arm and had a cut on his stomach. (Exhibit B 90:7-91:4) Officer Darress was inches to a foot from the window at this time. (Exhibit B 91:7-9) He was never more than five feet from the window. (Exhibit B 91:10-13)[5] Mr. Herring "mumbled or muttered something about wax, something about you being the police, your maybe here to hurt me." (Exhibit B 74:11-75:12, 93:15-20; Exhibit E 14:49:43) He told Officer Darress the children had left. (Exhibit B 73:4-7, 95:15-96:2) Officer Darress was told on four separate occasions, from three separate sources the children had left the apartment. (Exhibit B 73:8-74:10) At that point Officer Darress was "fairly sure the kids were not in the apartment." (Exhibit B 88:6-11) The officers had no information anyone else was in the apartment. (Exhibit B 96:3-5; Exhibit D 69:21-24) While Mr. Herring continued to throw items out of the window he did not throw them at Officer Darress. (Exhibit B 94:6-13) Officer Darress described Mr. Herring's behavior as "bizarre behavior", "abnormal behavior", "totally out of the ordinary behavior." (Exhibit B 80:18-22) Officer Darress formed the opinion Mr. Herring was suffering a "mental breakdown" or was on drugs. (Exhibit B 86:2-87:8) "Any trained police officer would have

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[5] It should be noted the officers' accounts of Officer Darress' location vary significantly. Officer Darress places himself inches to five feet from the window. (Exhibit B 91:7-13) Officer Carroll places officer Darress 25 yards from the window. (Exhibit C 125:15-126:25) No explanation is given by the officers for this factual conflict.

recognized Herring as exhibiting characteristic symptoms of being extremely emotionally disturbed and/or mentally ill. . ." (Exhibit H p. 4 ¶2) At no time did Officer Darress treat this as a response to a mental health issue. (Exhibit B 82:20-83:1)

Officers Ambuehl and Carroll arrived approximately a minute after Officer Darress (Exhibit B 93:21-23) Officer Darress instructed officers Carroll and Ambuehl to go to the front door to see if locked or unlocked. (Exhibit C 134:7-24; Exhibit D 81:13-17) Officer Ambuehl checked the front door and determined it was locked. (Exhibit C 135:25-136:3 Exhibit D 83:16-19) Officer Darress then instructs the other officers to kick in the door. (Exhibit C 139:-10; Exhibit D 85:14-86:11) Officer Ambuehl kicked the door twice and Officer Carroll once breaking the door jamb. (Exhibit C 141:6-10; Exhibit D 87:15-20) Officer Carroll indicated he made no attempts to deescalate the conflict prior to officers kicking in the door. (Exhibit C 150:22-24) Whatever attempts were made by Officer Darress to deescalate the conflict were made in the four minute period of time from initial contact to forcible entry. (Exhibit C 150:25-151:3)

After kicking in the door, Officers Carroll and Ambuehl entered the apartment, and moved toward Mr. Herring, checking rooms as they went. (Exhibit C 148:7-9; Exhibit D 88:3-23) No person other than Mr. Herring was found in the rooms they checked. (Exhibit D 89:10-15) During this time, Mr. Herring continued to speak with Officer Darress, making statements with religious overtones, referencing war and stating Officer Darress was there "to hurt him." (Exhibit B 98:18-99:4; Exhibit C 161:16-18; Exhibit D 91:11-13) When the officers make contact with Mr. Herring, Officer Carroll notes him to making state-

ments that fit the description of a person suffering mental illness. (Exhibit C 78:1-12; 79:2-13) Officer Carroll believed Mr. Herring was suffering some type of mental illness. (Exhibit C 161:22-162:2) This assessment was made prior to deploying the OC spray. (Exhibit C 162:3-5)

After seeing the officers, Mr. Herring throws an object at Officer Carroll and misses. (Exhibit C 150:1-7) Officer Darress instructs Officer Carroll to "Spray him." (Exhibit C 150:6-7) Officer Carroll did not recognize that OC sprays were contra indicated for use with mentally ill populations. (Exhibit C 151:13-152:1; Exhibit H p.5 ¶4) None of the officers had any training on the use of OC sprays on the mentally ill. (Exhibit C 152:2-12; Exhibit H p.5 ¶4)

Pursuant to Officer Darress' instructions, Officer Carroll sprayed Mr. Herring with a chemical agent. (Exhibit C 153:7-10) After being sprayed, Mr. Herring states "now we are all going to die" and approached Officer Carroll. (Exhibit C 155:15) He did not charge or otherwise engage in any hand-to-hand physical confrontation with police until after he had been sprayed. (Exhibit C 155:9-11; 156:3-5) He did not move toward the officers until after he had been sprayed. (Exhibit C 156:8-10) Up until that time the only aggressive act he had taken toward the officers was to throw an object at the officers and miss. (Exhibit C 155:12-16)

When Mr. Herring contacts Officer Carroll, they fall the ground and the door closes behind them. (Exhibit C 159:22-25) At this time they are in the confined space of a small bathroom. (Exhibit C 160:7-10) Mr. Herring fell face down with Officer Carroll to his side. (Exhibit C160:25-161:1) Mr. Herring was face down during his entire encounter with CSPD

officers. (Exhibit B 104:4-8) After approximately five or six seconds, Officer Ambuehl entered the bathroom and attempted to control Mr. Herring's feet. (Exhibit D 98:19-99:13) Officer Darress arrived in under a minute (Exhibit D 101:6-9) and attempted to use a comforter as a straight jacket (Exhibit B 100:3-102:4).

During the physical confrontation, Officer Carroll struck Mr. Herring with his fists multiple times. (Exhibit C 165:8-20) Officer Carroll deployed his PR-24. (Exhibit C 165:21-25) Officer Darress struck Mr. Herring 5-6 times with his fist and struck Mr. Herring with a "flat chop" with his PR-24. (Exhibit B 58:21-59:17) Officer Carroll cuffed Mr. Herring's left arm. (Exhibit B 106:7-22) Officer Duress was finally able to cuff Mr. Herrings right aim. (Exhibit C 167:9-16) At this point his hands were cuffed in front of his body. (Exhibit C167:2-16)

Officer Darress recognized that blows or other contact with a suspect's neck could "cause severe injury or maybe even death." (Exhibit B 62:1-7) Contact with a suspect's neck could be considered deadly force. (Exhibit B 62:6-8; Exhibit H p.5 ¶5) Officer Darress indicates he jammed his thumb into the right/middle side of Mr. Herrings neck and applied "quite hard" force for approximately 30 seconds. (Exhibit B 111:2-112:5; 113:11-12) This application of force crushed Mr. Herring's trachea resulting in respiratory arrest and eventual death. (Affidavit and Report of Linda Norton, MD, October 11, 2005, p.2, attached hereto as Exhibit G)

Officer Carroll asked the medical personnel to administer a sedative to Mr. Herring. (Exhibit C 168:20-169:14) Ambulance personnel administered 5mg of Haldol to Mr. Herring. (Deposition of Colorado Springs Fire Department Paramedic Clark Gaddie,

September 23, 2005, 49:4-25, attached hereto as Exhibit F) Fire Department Paramedic Gaddie then administered 5mg of Valium. (Exhibit F 51:4-17) The amount and combination of medications given to Mr. Herring, were within established protocols for the administration of such drugs. (Exhibit F 53:18-55:20). These drugs had not entered Mr. Herring's system at the time of his death. (Exhibit G p. 2)

After the administration of the medication, Mr. Herring struggled for a minute or two and he finally stopped struggling. (Exhibit C 170:12-14; Exhibit B 55:7-17) Officer Carroll saw Mr. Herring's chest rise and fall and summarized he was breathing. (Exhibit C 170 15-21). Officer Darress described Mr. Herring's breathing at this time as "jerky". (Exhibit B 117:8-11). Approximately two minutes later, Mr. Herring was examined by paramedics who determined that he had a strong pulse, but was no longer breathing. (Exhibit F 61:14-62:3) Lifesaving measures were taken, but Mr. Herring died. Sixteen minutes elapsed between the time his door was kicked in and the time he died. (Exhibit C 164:3-6).

III. STANDARD

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997). "When applying this standard, we

view the evidence and draw reasonable inferences therefrom in the light most favorable to the non-moving party." *Simms v. Oklahoma ex rel. Dept of Mental Health & Substance AbuseServs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

A court may not approve summary judgment in excessive force cases—based on qualified immunity or otherwise—if the moving party has not quieted all disputed issues of material fact. *Allen v. Muskogee*, 119 F.3d 837, 840-842 (10th Cir. 1997). Factual disputes involving the "immediate connection" of an officer's use of force in response to "a suspect's threat of force" prevent a court from granting summary judgment. *Id.* at 840. Where a disputed issue of material fact remains, that ends the matter for summary judgment. The court may not move on to determine whether an officer's actions were "objectively reasonable." *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1313-1315 (10th Cir. 2002).

IV. THE TOTALITY OF THE CIRCUMSTANCES GIVE RISE TO GENUINE ISSUES OF METERIAL FACT REGARDING THE IMMEDIATE CONNECTION OF THE OFFICERS' CONDUCT AND THE USE OF LETHAL FORCE

A police officer violates a person's clearly established Fourth Amendment right to be free of excessive force if the officer's use of force was not "objectively reasonable" in light of the facts and circumstances confronting the officer. *Graham v. Connor*, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989); *Cruz v. City of Laramie*, 239 F.3d 1183, 1188 (10th Cir. 2001). This reasonableness standard—which is "clearly established" for the purposes of § 1983 actions, *(Wilson v. Meeks,* 52 F.3d 1547, 1552

(10th Cir. 1995)) requires the court to consider factors including the alleged crime's severity, the degree of potential threat that the suspect poses to an officer's safety and to the safety of others, and the suspect's efforts to resist or evade arrest. *Medina v. Cram,* 252 F.3d 1124, 1131 (10th Cir. 2001). The "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" *Bell v. Wolfish,* 441 U.S. 520, 559, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Whether an officer acted reasonably in using deadly force is "heavily fact dependent." *Romero v. Board of County Comm'rs,* 60 F.3d 702, 705 n.5 (10th Cir. 1995) See *Tennessee v. Garner,* 471 U.S. at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"). The use of lethal force against a mentally ill man who was in his own apartment and was not posing a risk to officers is not reasonable under the totality of the circumstances.

A. The Totality Of The Circumstances Requires The Court To Consider The Officer's Actions In Initiating The Need To Use Force.

The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. *Sevier v. City of Lawrence, Kan.,* 60 F.3d 695, 699 (10th Cir. 1995). The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force. *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995) See *Bella v. Chamberlain,* 24 F.3d 1251, 1256 & n.7 (10th Cir.

1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.") (following *Graham,* 490 U.S. at 395, and *Gamer,* 471 U.S. at 8), *cert. denied,* 130 L. Ed. 2d 783, 115 S. Ct. 898 (1995); see also *Estate of Starks v. Enyart,* 5 F.3d 230, 234 (7th Cir. 1993) (same); Yates, 941 F.2d 444 at 447 (same); *Gilmere v. City of Atlanta, Ga.,* 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (same), *cert. denied,* 476 U.S. 1115, 90 L. Ed. 2d 654, 106 S. Ct. 1970 (1986).

A genuine issue of material fact exists as to whether the Officer's conduct immediately prior to the use of force unreasonably created the need to use force. Officers were on scene a total of four minutes before kicking in the door. (Exhibit B, 98:12-15 ("less than five minutes"); Exhibit C 123:15-18) The officers made no attempt to contact supervisory personnel or personnel trained in mental illness or hostage negotiation. (Exhibit C 140:20-141:1) Chief Velez admits that if the officers knew Mx. Herring was suffering a mental health crisis they should have considered that fact before they kicked in his door. (Exhibit A 169:13-20)

The officers never received any information to contradict the dispatch calls that no weapons were involved and the children had fled the apartment. (Exhibit B 70:15-71:30; Exhibit C 129:17-130:1, 139:11-17) The officers had no information anyone else was in the apartment. (Exhibit B 96:3-5; Exhibit C 142:17-19) The officers did not see any other person in the apartment. (Exhibit B 90:3-5; Exhibit C 146:10-13). Mr. Herring was never aimed at any point during this encounter with the CSPD.

Mr. Herring was outnumbered three to one by officers. (Exhibit C 146:14-16) Mr. Herring was not trying to flee. (Exhibit C 146:17-19; Exhibit D 84:15-18) The officers had no reason to believe Mr. Herring was trying to destroy evidence. (Exhibit C 146:20-147:11) The officer's had no information he was attempting suicide. (Exhibit D 84:19-22) The officers had no information anyone other than Mr. Herring was injured. (Exhibit C 147:15-21) The officers did not know the nature or extent of Herring's injuries, or, in the case of Officer Carroll, if Mr. Herring was injured. (Exhibit C 147:22-148:3)

Plaintiffs' police policy expert, unquestionably one of the leading experts in the field of police policy and training concludes the officer's response was not "in any manner consistent with the police recognized standard of for either recognizing, approaching, responding to or communicating with a mentally ill or emotionally disturbed person—especially one situated like Herring, who was in an apartment, alone, and not threatening anyone while experiencing his episode. (Exhibit H p.5 ¶4) Based on the totality of the circumstances there is a genuine issue of material fact as to whether the officers' conduct in dealing with Mr. Herring (obviously suffering a mental health crisis) was unreasonable and unreasonable created the need to use force. See *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995); cf. *Myers v. Oklaoma Bd. of County Comm'rs*, 151 F.3d 1313 (10th Cir. 1998) (Recognizing that the excessive force inquiry included the officers' conduct leading up to the suspect's threat of force, the Court found that actions such spending "hours" attempting to "resolve the situation through non-confrontational communication" and obtaining a Court order to take a mentally ill person into custody before entering the apart-

ment were reasonable) Had the officers spent hours rather than less than five minutes attempting to communicate with Mr. Herring, or had even a minimum amount of training the outcome may have been much different. (Exhibit H p.5 ¶14)

Defendants excuse the officers conduct because the officers were attempting to help Mr. Herring. The fact that the officers involved may have had the intent of helping Mr. Herring is irrelevant. The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States,* 436 U.S. 128, 137-139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978) An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *Sevier v. City of Lawrence,* 853 F. Supp. 1360, 1367 (D. Kan. 1994)

The Defendants' reliance on *Caricofe v. Mayor and City Counsel of Coean Maryland,* 32 Fed.Appx. 62 (4th Cir. 2002) is likewise misplaced. Excessive force cases must be decided on the unique facts of each case. Whether an officer acted reasonably in using deadly force is "heavily fact dependent." *Romero v. Board of County Comm'rs,* 60 F.3d 702, 705 n.5 (10th Cir. 1995) In the *Caricofe* case, the suspect was in a hotel, where he posed risk to other guests, not alone in his own home. The suspect in *Caricofe* did not respond to attempts to speak with officers. Mr. Herring was actively engaged in discussions with officers at the time they resorted to violence. Caricofe was

attempting to flee, Mr. Herring was not. The proper analysis is under binding Tenth Circuit case law not unbinding Fourth Circuit case law. See *Myers v. Oklaoma Bd. of County Comm'rs,* 151 F.3d 1313 (10th Cir. 1998) (hours of negotiation and Court order reasonable); *Allen v. Muskogee,* 119 F.3d 837, 840-842 (10th Cir. 1997) (Question of fact regarding police use of force on an emotionally disturbed man who pointed a gun at police); *Sevier v. City of Lawrence, Kan.,* 60 F.3d 695, 699 (10th Cir. 1995) (Police officers shoot mentally ill man armed with a knife) Under the circumstance of this case, a question of fact exists as to whether the unreasonable response to a mentally ill person caused the need for force. This being so, no additional inquiry need be made by the Court.

B. Genuine Issue Of Material Fact Exists Regarding The Officers' Use Of Lethal Force After Entering The Apartment.

Upon entering the apartment, Defendant officers' escalated a circumstance caused by their own unreasonable conduct. Officer Carroll did not recognize that OC sprays were contra indicated for use with mentally ill populations and would cause an escalation in the need to use force. (Exhibit C 151:13-152:1; Exhibit H p.5 ¶4) None of the officers had any training on the use of OC sprays on the mentally ill. (Exhibit C 152:2-12; Exhibit II p.5 ¶4) Mr. Herring did not charge or otherwise engage in any hand-to-hand physical confrontation with police until after he had been sprayed. (Exhibit C 155:9-11; 156:3-5) He did not move toward the officers until after he had been sprayed. (Exhibit C 156:8-10) Up until that time the only aggressive act he had taken toward the officers was to throw an object at the officers and miss. (Exhibit C 155:12-16)

The final application of neck compression, lethal force, to an unarmed man, face down with officers on top of him was "contrary to recognized police procedures." (Exhibit H p. 5 ¶5) A genuine issue of material fact exists as to whether the Defendant officers needed to kill Mr. Herring.

C. Genuine Issue Of Material Fact Exists As To Whether The Conduct Of The Officers Was Sufficient To Shock The Conscience.

Whether the conduct of the Defendants was sufficient to shock the conscience is a factual determination based on the totality of the circumstances of the case. Defendants' Motion in this regard is premised in part on the fact that the Defendants "never resorted to deadly force."[6] Defendants did in fact resort to deadly force against an unarmed man, who was speaking with police, from his own apartment, and posing no threat whatsoever to any person. Under such a circumstance a reasonable jury could find the officers' conduct shocked the conscience.

VI. THE TRAINING GIVEN THE DEFENDANT OFFICERS "WAS OF SUCH A MINISCULE AMOUNT . . . [THAT IT] REACHED THE LEVEL OF DELIBERATE INDIFFERENCE"

For decades the accepted standard of care required police officers to recognize and train for contact with the mentally ill. (Exhibit H p.4 ¶2) Officer Darress' training relating to the mentally ill constituted only .21% of his total academy training. Officer Carroll's training relating to the mentally ill constituted only .58% of his academy training. Officer Ambuehl's training constituted only .42% of his academy train-

[6] Defendants Motion for Summary Judgment p. 33.

ing. The training received by these officers was "of such a miniscule amount for such a likely encounter by a police officer that the amount of training simply reached a level of deliberate indifference." (Exhibit H, p.5 ¶4)

The inadequacy of police training may serve as a basis for § 1983 liability where the failure to train amounts to deliberate indifference. *City of Canton v. Harris,* 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct 1197 (1989). To establish a city's liability under 42 U.S.C. § 1983 for inadequate training of police officers in the use of force, a plaintiff must show (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. *Zuchel v. City and County of Denver*, 997 F.2d 730, 734-35 (10th Cir. 1993).

Defendants' Motion for Summary Judgment as to Plaintiffs Monell claims is premised mainly on the allegation no constitutional violation occurred. As discussed above, the officers' conduct in unreasonably causing the need for force and in unreasonably escalating to lethal force constituted violations of Mr. Herrings' Fourth Amendment right to be free of excessive force. Defendants' motion must fail in this regard.

Evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring

situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability. See *Board of County Comm'rs v. Brown,* 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997) It is well recognized in case law7, and admitted by Defendants, that contact with the mentally ill constitutes a usual and recurring part of police work, particularly given Colorado Springs' large mentally ill population. Under one half of one percent of the officer's initial training dealt with the mentally ill. None of the officers could identify any significant training they had in dealing with the mentally ill prior to the encounter with Mr. Herring. Plaintiffs' well recognized police policy expert opines that given the level of expected contact with the mentally ill, this lack of any substantial training relating to the mentally ill rises to the level of deliberate indifference. *Allen v. Muskogee,* 119 F.3d 837, 840-842 (10th Cir. 1997) (relying on the opinion of a police policy expert to deny motion for summary judgment regarding *Monell* issues). The lack of training alleged herein clearly has a causal connection to the officers' unreasonable conduct resulting in Mr. Herring's death.

VII. A GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING THE REASONABLENESS OF THE WARRANTLESS ENTRY OF PLAINTIFFS HOME.

Distinct from Plaintiffs use of force claim (premised in part on Defendants causing the need to escalate to the use of force, is a separate cause of action for warrantless entry. A genuine issue of material fact exists as to whether warrantless entry was reasonable under the totality of the circumstances.

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[7] *Allen v. Muskogee,* 119 F.3d 837, 842 (10th Cir. 1997)

The report received by the officers was that Mr. Herring was in his own apartment. (Exhibit E 14:41:15, Exhibit B 73:18-21; Exhibit C 116:22-25; Exhibit D 69:25-70:2) The officers were informed by both dispatch and third parties that "Kids now running away from the apartment." (Exhibit E 14:36:51, Exhibit B 72:3-7; Exhibit C 115:17-25); 8). At that point Officer Darress was "fairly sure the kids were not in the apartment" (Exhibit B 88:6-11) The officers had no information anyone else was in the apartment. (Exhibit B 96:3-5; Exhibit D 69:21-24) The officers did not see any other person in the apartment. (Exhibit B 90:3-5; Exhibit C 146:10-13). The officers never received any information to contradict the dispatch calls that no weapons were involved. (Exhibit B 70:15-71:3; Exhibit C 129:17-130:1, 139:11-17) Mr. Herring was never armed at any point during this encounter with the CSPD. (Exhibit C 156:13-14) While Mr. Herring continued to throw items out of the window he did not throw them at Officer Darress. (Exhibit B 94:6-13)

Mr. Herring was outnumbered three to one by officers. (Exhibit C 146:14-16) Mr. Herring was not trying to flee. (Exhibit C 146:17-19; Exhibit D 84:15-18) The officers had no reason to believe Mr. Herring was trying to destroy evidence. (Exhibit C 146:20-147:11) The officer's had no information he was attempting suicide. (Exhibit D 84:19-22) The officers had no information anyone other than Mr. Herring was injured. (Exhibit C 147:15-21) The officers did not know the nature or extent of Herring's injuries, or, in the case of Officer Carroll, if Mr. Herring was injured. (Exhibit C 147:22-148:3)

The reasons given by the officers for entering the apartment in their self-serving affidavits in support

of Summary Judgment are nothing more than "could have beeps." There "could have been" others in the apartment. There "could have been" serious injury to Mr. Herring. "Could have been" does not rise to exigent circumstances. In making the decision to enter a home without a warrant, the officer is bound to "facts and circumstances within the officer's knowledge and of which he or she has reasonably trustworthy information [which] are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense." *Guffey v. Wyatt,* 18F.3d 869, 873 (10th Cir. 1994) [internal quotation omitted] The fact that an officer "was concerned because of the lack of police knowledge of the inside of the residence" and that "this lack of intelligence 'itself is a dangerous situation because you don't know what to expect,'" [citation omitted] does not establish exigent circumstances sufficient to justify the no-knock entry. The statement is tautological and would apply to virtually all warrants. *United States v. Musa,* 401 F.3d 1208, 1217 (10th Cir. 2005). Under the circumstances, there is no reason, as in *Myers v. Oklaoma Bd. of County Comm'rs,* 151 F.3d 1313 (10th Cir. 1998), the police could not have continued a non-confrontational dialogue with Mr. Herring and obtained a Court order to enter if appropriate. Genuine issues of Material fact preclude dismissal of this claim.

VIII. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER THE DEFENDANTS' CONDUCT CONSTITUTED A DEPRIVATION OF FAMIAL COMPANIONSHIP

The parental relationship warrants the greatest degree of protection and requires the state to demonstrate a more compelling interest to justify an intrusion on that relationship. *Trujillo v. Board of County*

Comm'rs, 768 F.2d 1186, 1189 (10th Cir. 1985) Plaintiffs recognize and inform the Court that current case law, as referenced in the *Trujillo* case is contrary to the position of the Plaintiffs in this case. In particular, Plaintiffs agree there must be some showing of intent to deprive the right of association. Plaintiffs do however believe that there exists a good faith basis to extend existing law.

A reasonable jury could find that the Defendants' conduct was reckless. In addressing the outer limits of the "intentional" or "deliberate indifference" standard, courts have held that reckless conduct could form the basis for a due process violation. Recklessness "is a proxy for intent . . . and recklessness includes an element of deliberateness—a conscious acceptance of a known, serious risk." *Archuleta v. McShan,* 897 F.2d 495, 499 (10th Cir. 1990). To the extent intent is required, the reckless conduct of the defendant is sufficient to impose liability on the Defendants. *Archuleta v. McShan,* 897 F.2d 495, 499 (10th Cir. 1990).

Defendants were told on multiple occasions that children lived in the apartment with Mr. Herring. The Defendants knew any action they took in relation to Mr. Herring, particularly the application of lethal force would have a significant impact on them. The Defendants' reckless conduct as it relates to the children, and the deprivation of their association with their father caused by the application of lethal force, is sufficiently intentional and sufficiently directed toward the Plaintiffs to give rise to a cause of action.

IX. CONCLUSION

Based on the forgoing, genuine issues of material fact exist in relation to Plaintiffs' claims. Plaintiffs

respectfully request Defendants' Motion for Summary Judgment be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Magistrate Judge Patricia A. Coan

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING, by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

DEPOSITION OF LUIS VELEZ
SEPTEMBER 9, 2005

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* * * *

[10] tell me what you did to prepare for this deposition?

A. Actually, I called the training academy to find out how many total hours we have in our new recruit academy. I also asked how many POST mandated hours we are mandated to give to our officers.

Q. Who did you call?

A. Lieutenant John Godsey, the director of the training academy.

Q. And did he give you both information regarding the hours of training and the training academy and POST mandated hours?

A. Yes.

Q. And why was he the appropriate person to call?

A. Well, he's the director of our training academy. He would have that information.

Q. Would he be the person most knowledgeable within the Colorado Springs Police Department as it relates to officer training issues?

A. He would be one of them.

Q. Okay. Who would be the others?

A. Well, Sergeant Chuck Rabideau.

Q. Could you spell Rabideau?

A. R-A-B-I-D-E-A-U.

Q. And what is Sergeant Rabideau's position [11] or duties within the Colorado Springs Police Department?

A. He's a training sergeant at our training academy.

Q. Does he work under—I think it's Lieutenant Godsey. Is that what you said?

A. Yes.

Q. Okay. And he does work under Lieutenant Godsey?

A. Yes.

Q. Thank you. I apologize for the compound question.

Any others who would have knowledge equal to either Lieutenant Gaza or Sergeant Rabideau as it relates to training issues?

A. Godsey, G-O-D-S-E-Y.

Q. Thank you.

A. I would have to say Ms. Rose Timora.

Q. Why don't you give us the spelling on Timora.

A. Sure. T-I-M-O-R-A. She is the secretary at the training academy. She works for Lieutenant Godsey and for Sergeant Rabideau; also very knowledgeable about the number of hours that we provide our officers.

[12] Q. From time to time, Chief; I will ask you if your answer is complete. When I ask you that question, I'm not prompting you to give me more information. I just want to make sure that I don't go on to another area while you're thinking about something or trying to give me more information.

Is your answer regarding who else would 3 have knowledge equal to Lieutenant Godsey and Sergeant Rabideau complete?

A. As far as I know. There are—there are quite a number of people who work at the training academy, but those three would be the most likely to have that information.

Q. Is every Colorado Springs police officer required to go through the training academy?

A. Yes, sir.

Q. Does that include lateral hires?

A. Yes.

Q. And for how long has that been the policy of the Colorado Springs Police Department?

A. As long as I've been here.

Q. You know, I can't remember whether I asked you this. When did you become Chief?

A. Became Chief in 2002.

Q. Can you tell me specifically what you [13] asked Lieutenant Godsey?

A. Sure. I asked him if he could give me the number of hours that we are currently providing to our training academy recruits.

Q. Okay.

A. And then if he could give me the number of mandated POST, P-O-S-T, hours. Now, POST stands for Peace Officer Standards and Training. It is a mandated number by the state of Colorado.

Q. Are all of your officers POST certified?

A. Yes.

Q. Did you ask Lieutenant Godsey for any other information?

A. I don't believe I did, no.

Q. Did you ask Lieutenant Godsey to break down for you what specific training—strike that. Let me ask it this way.

Within the number of hours that a—that an officer receives at the training academy, did you ask Lieutenant Godsey to break that down by subject matter?

A. Actually, he broke down the number of hours to an extent that we train our officers in use of force.

Q. And how many hours do your officers [14] receive in use of force training?

A. He told me 96 hours total, and they were broken down. He mentioned two categories. One was 82 hours, and the other one was 14 hours.

Q. Okay. What's the 82 hours and what's the 14 hours?

A. I'm not sure I remember.

Q. Is your answer complete?

A. It is.

Q. Over what period of time would an officer complete the 96 hours total training on use of force?

A. That would be during the 25 weeks of the training academy.

Q. And how many hours are POST mandated?

A. As far as use of force hours?

Q. Let me back up. That's a real good distinction. How many total hours do officers receive in the training academy?

A. 947 hours.

Q. And how many total hours are mandated by POST?

A. I believe he told me 546.

Q. And of the POST mandated hours, how many of those are use of force hours?

[15] A. I don't know.

Q. Did you inquire of Lieutenant Godsey the number of hours the training officers receive as it relates to interacting with persons with behavioral disturbances or mental illnesses?

A. No.

Q. Did he volunteer that information to you in the same fashion he did the use of force?

A. No.

Q. Did you inquire of him whether there was any POST mandated hourly training or number of hours for interaction with people with behavioral disturbances or mental illnesses?

A. No.

Q. Do you have an independent knowledge as to whether there are any POST mandated training hours relating to behavioral disturbance or interaction with the mentally ill?

A. No.

Q. Did you speak with anyone aside from Lieutenant Godsey in preparation for this deposition?

A. I actually spoke to Ms. Timora.

Q. And if you would relate to me the subject of your conversation with Ms. Timora.

A. It was exactly—I was asking the same, [16] exact questions of her. As I was doing that, she informed me that he was calling me on the other line.

Q. Okay. Did she give you any information that was either additional to or different from that you received from Lieutenant Godsey?

A. The only thing that she told me was regarding in-service training, which had nothing to do with my questions.

Q. What is in-service training?

A. Every officer undergoes what we call in-service training. Once they graduate from the academy, they go through an 18-week police training—police training program. Every year thereafter they come back for periodic recertification. We call those in-service training.

Q. Now, recertification suggests to me that there's a certifying body. Are you referring to POST certification or another type of certification?

A. It may be POST. It may be others. There are a number of issues, as an example, first aid training. I believe it's the American Red Cross that certifies people in first aid training. If you do CPR training, it's the American Heart Association that certifies that. So there's a number of different agencies that certify, but it's that kind [17] of retraining, if you will, that we call in-service training.

Q. Is there any certification by anybody as it relates to mental illness or behavioral disturbance?

A. There's no certification. There is a process—there is training that we currently are undergoing called Crisis Intervention Training, CIT training.

Q. Is that based on the Tennessee model?'

A. It is.

Q. We'll get to that in a little while.

A. Okay.

Q. Did you have any other discussions—excuse me.

Is our discussion regarding Ms. Timora's conversation with you complete?

A. Yes.

Q. Okay. Conversations with anybody else?

A. No.

Q. Did you make any memoranda or notes regarding either of these conversations?

A. No.

Q. Did you review any documents in preparation for this deposition?

* * * *

{46] they are not just standing at a podium.

Q. Got it. Do you know whether there's a 3 master index of these videos?

A. I would have to assume that there are.

Q. Sergeant Drobeck would know that?

A. Officer.

Q. Excuse me. I apologize. You can tell him I just gave him a promotion.

Who determines the subject matter of Officer Drobeck's entertaining, engaging, informative videos?

A. That would be generally anybody from the staff, and by "the staff," I Mean from myself down to any supervisory level in the organization.

Q. What is the last subject that you asked Officer Drobeck to prepare a video on?

A. That I personally asked?

Q. Yes, sir.

A. I can't remember.

Q. Do you recall anybody, whether it's yourself or a member within your command staff, specifically requesting Officer Drobeck to prepare a 3 video relating to officer interaction with the mentally ill or behaviorally disturbed?

A. It seems to me that there was a request [47] at one time to develop such a video, and I would have to—I think it was in conjunction with the initiation of the CIT program.

Q. Do you recall whether any such video was prepared prior to May of 2003?

A. There may have been. There has been literally thousands of videos that have been created. There certainly, may have been prior to 2003.

Q. Is there any standard or policy within the CSPD as to officers taking notes of these video training sessions?

A. No.

Q. And this may not be a generality you can make, Chief, but as a general rule, do officers keep notes of this stuff?

A. No.

Q. As part of the initial police training or any subsequent training that your officers undergo, are they instructed or advised to keep some kind of, you know, running training library or manual?

A. No.

Q. There are some departments that I've had litigation against that specifically give officers big, three-ring binders to put training materials, [48] and do y'all do anything like that?

A. We used to. With the advent of computers, its much more efficient to do things on line. So we no longer give our officers those big, three-ring binders.

Q. When did you stop doing that?

A. Offhand, I would say probably in the year 2000, maybe 1999, somewhere in there.

Q. What training materials are either contained on or distributed through a computer network?

A. Well, all of our general orders are on line. All of our SOP's are on line. All of our bulletins are on line. And generally, as officers receive updates, it will be on line.

Q. Who was responsible for maintaining the on-line orders, SOP's, bulletins, and updates?

A. I believe that person is named Tracy Jacob-St. Claire.

Q. And what is Ms. Jacob-St. Claire's job position or title?

A. She is our web—

Q. Guru?

A. Web person. She maintains our intranet and maintains our Internet.

[49] Q. Is that portion of the web which contains the orders, SOP's, bulletin, and updates accessible by the public?

A. The public has accessibility on our general orders, and I believe that we even give our general orders to the public library. They do not have access to our SOP's nor our bulletins.

Q. Is there any type of index regarding the materials that are placed on line?

A. Yes, I believe so. There's a—as I can recall, there are ten major subdivisions within our general orders, and then there are subsets within 3 those ten decisions.

Q. Where would information relating to officer interaction with the mentally ill or behaviorally disturbed fall?

A. I'm not sure.

Q. Do you anticipate that Ms. Jacob-St. Claire would have that information?

A. Yes, I would.

Q. Is any information relating to the CIT program held on line?

A. Yes.

Q. And do you know where that's held?

A. Specifically, no, I don't.

* * * *

[66] regarding warrantless entries?

A. Yes.

Q. For each of the categories I've just asked, use of force, use of chemical sprays, and warrantless entries in the home, all of your answers would have been the same as of 2003. Correct?

A. Yes.

Q. And Chief, for the purposes of the next two categories, which are very similar to these and set up the same way, I'm referring from the beginning of 2003 to the present. Okay?

A. Okay.

Q. Do you agree that it's foreseeable that Colorado Springs police officers will come in contact with persons with disabilities during the course and scope of their employment?

A. Yes.

Q. Do you agree that a reasonable police department will give its officers training on the proper method of interacting with persons with disabilities?

A. Yes.

Q. Do you agree that if an officer does not receive proper training regarding contacting persons with disabilities there is a risk the officer may act [67] improperly and cause harm to that member of the public?

A. Yes.

Q. And are you the one ultimately responsible for ensuring that your officers are properly trained regarding contact with the disabled?

A. Yes.

Q. Would you agree that it's foreseeable that Colorado Springs Police Department officers will encounter situations where they'll need to contact persons suffering a mental illness or behavioral disturbance?

A. Yes.

Q. Would you agree, sir, that police officers, unfortunately, nowadays are oftentimes first responders when there is an issue of mental illness?

A. Absolutely.

Q. And has that changed over the years?

A. It has changed over the years. We come into contact more and more frequently with people who are mentally ill now than ever before.

Q. And why is it more frequent now?

A. Well, in the state of Colorado in particular within the past five to six years there [68] has been substantially reduced funding for dealing with the mentally i11, and society has not created a safety net other than the police. The police are always the backstop for society. So now, as there are more and more problems dealing with mentally ill, there are—there are no longer the agencies in place to deal with them as there used to be or there is not the funding that was there previously.

It becomes an issue of the police comes more into contact with the mentally ill than ever before.

Q. As the amount and number of contacts have increased over the past five or six years, would you agree then that caused an increased need for training and education of officers?

A. Well, I think we were giving our officers significant training previously in dealing with the mentally ill. What has come about in the recent past, in particularly with the CIT program, is that there are new tactics in dealing with the mentally ill.

Q. I'm not sure, Chief, whether that actually answered my question, and my question did not go to whether the tactics had changed or whether the officers previously received proper training. My [69] question is more geared toward as the number of contacts with the mentally ill increase, does the importance of training in relation to those contacts also increase?

A. Well, I guess I would give a qualified yes.

Q. What's the qualification?

A. Well, it's—the kinds of contacts that we have with the mentally ill are not that much different than the kinds of contacts that we have with people that we would consider mentally stable. We need to care for both groups, and we have significant training in doing that. And again, it goes back to the issue that I was mentioning earlier. We have some new particular training that deals with a different way of dealing with people who are in crisis, but there are normal people every day who are in crisis that are not mentally ill.

Q. But Chief, you would agree that with the mentally ill there are special needs and special ways of interacting with those people that don't hold true for a mentally stable population.

A. I would not agree with that.

Q. Do you agree with the statement that due to mental illness certain activities that would [70] de-escalate a situation in a stable person would escalate a situation for a mentally disabled person?

A. They may or may not. For eight years, I served as a hostage negotiator. The predominant training of CIT is hostage negotiation training, and it is training that's meant to deescalate emotion. Sometimes in both mentally stable individuals and in the mentally ill those techniques do not work, and in reality they have the opposite.effect. They tend to escalate emotions in people.

Generally, however, those techniques do work in both people who are mentally stable and people who are mentally ill. And those techniques are varied, but they generally work on both population groups.

Q. At what point does an officer need to consider a person's mental status when making a decision as to how they're supposed to approach a situation? Let me withdraw that question and ask a different question, Chief. And I apologize for doing that. If you want to answer it, you can.

A. No. That's okay.

Q. You're not suggesting that an officer -can treat a person undergoing a behavioral disturbance or mental illness the same way an officer [71] can a stable person. Are you?

A. No. What I'm suggesting is that when people are in crisis, the diference between what we would consider a mentally stable person and a person with mental illness is there's a very little degree of difference between those two when they are in crisis.

Q. Okay. And perhaps, Chief, what we have is a semantic difference. That's why I've been trying to

use the term both behaviorally disturbed and mental illness. By behaviorally disturbed, I'm referring to a person that doesn't necessarily have a mental illness, but is acting in a way which would be unusual or bizarre for a normal human being. Is that what you're meaning by way of a personal crisis?

A. Well, I guess. To a police officer—

Q. Okay.

A. —when we first show up at a scene, we don't know if somebody is having a behavioral event or if they're mentally ill. We don't know that, and we may never become aware of why an individual is acting out in the way that they happen to be acting out. That determination may be made later by a professional, a psychiatrist or a psychologist or somebody of that nature.

[72] Q. Well, Chief, you'd agree that under Colorado law a law enforcement officer is allowed to make an initial assessment as to whether, for example, somebody needs to go to jail or somebody needs to go to a mental health care facility.

A. Yes, except nowadays those mental health 7 facilities don't exist.

Q. Understood. But there are psychiatric hospitals that are inpatient—

A. Yes.

Q. —involuntary treatment programs, et cetera.

A. Yes.

Q. Okay. And the fact that an officer statutorily is allowed to make those assessments suggests that an officer, even though the officer may not have a complete picture of what's going on, has the ability to form some opinions and make some assessments. Correct, sir?

A. Yes.

Q. All right. And part of what an officer does when an officer arrives on scene is to given the information available to the officer and make assessments and judgments as to the situation they're faced with. Correct?

[73] A. Yes.

Q. And those assessments and judgments are informed by and to the extent possible directed by the training that they've received. Correct?

A. In part, yes.

Q. Okay. And to the extent that an officer. has failed to receive the appropriate training, that officer is less well equipped to make those judgments and assessments.

A. Yes.

Q. And part of the judgment or assessment that an officer needs to make when an officer arrives on a scene is whether a—an individual that they're interacting with is suffering from some type of crisis or behavioral disturbance or mental illness. Correct?

A. They try to make those assessments, yes.

Q. And part of the reason for the need to make that assessment is so that they can determine how best to interact with that member of the public.

A. Again, a qualified yes.

Q. What's the qualification?

A. Because depending on how that individual is acting, their mental state of mind takes a backseat to the necessary actions that the officer [74] will have to take during that event.

Q. Doesn't the person's state of mind dictate to some extent the officer's actions?

A. The person's state of mind and the threat that they pose will dictate the response by the officers. In other words, a mentally ill—a severely mentally ill person can pose a deadly threat to an officer. The

officer's initial concern is not with that person's mental state, but with the threat posed.

Q. In any situation where an officer contacts a member of the public, officer safety concerns are implicated. Correct, sir?

A. Yes.

Q. Okay. And in each of those circumstances where officer safety issues are implicated, an officer needs to make those decisions that are in part governed by how best to protect himself, members of the public, and other officers. Correct?

A. Yes.

Q. And I'm not trying to exclude women officers.

A. Yes.

Q. In making that initial assessment or [75] determination as to how best to protect themselves, members of the public, and other officers, part of - what they need to consider is how their actions will escalate or deescalate the conflict. Correct?

A. Well, they would have to consider that, yes.

Q. Okay. And the overwhelming majority—and the only reason I don't say all is I've not read all the different kind of programs dealing with the mentally ill, for example, the CIT program—is designed to specifically train an officer or give the officer those tools required to make decisions as to how their decision as it relates to action with the member of the public is likely to escalate or deescalate the circumstance when faced with the mentally ill or somebody undergoing a behavioral crisis.

A. Yes.

Q. So it's fair to say then, Chief, that an Officer when choosing how to react to a situation is going to consider as part of officer safety and safety of the public how their actions are going to affect a mentally ill or behaviorally disturbed person.

A. Yes.

[76] Q. Okay. Do you know in the past five years what percentage of your department's emergency calls were related to a mental health care or behavioral crisis?

A. No, I don't.

Q. Who would keep—first of all, does CSPD keep such a statistic?

A. No.

Q. All of the studies that I've seen in relation to CIT, whether it be Portland or Albuquerque or even Waterloo, Iowa, that keep those statistics,' are y'all keeping those as part of your CIT program?

A.. We are not keeping them at the level of calls for service, and I don't believe that we are keeping them other than the specific calls that our CIT trained personnel respond to that we are keeping that kind of data. There were estimates going back to probably four years ago that in this community there are 50,000 mentally ill individuals, and I believe that that probably is a pretty good estimate. But that's 50,000 out of almost 400,000 people in our city. That's a significant chunk of our population.

That would mean just by extension that our officers are in contact with those 50,000 many [77] times, but we do not have that kind of data specifically putting out if we were in contact with that 50,000 group.

Q. When did you become aware of the fact that there was that large of a population of mentally ill that your officers may come in contact with?

A. Probably shortly after I became a police officer.

Q. So it's fair to say that you knew that at least by May of 2003?

A. Yes.

(Brief interruption in the proceedings.)

(Recess taken from 10:49 a.m. to 10:51 am.)

(Ms. Fort is not present.)

Q. BY MR. FRANK: Do you agree that a reasonable police department will give its officers training on the proper methods to safely contact a person suffering mental illness or behavioral disturbance?

A. Yes.

Q. What is the risk to the public and to officers of not providing that training.

A. Well, the training you're referring to I would—I would categorize it as communications [78] skills first and foremost. The ability to communicate with another human being is how we gel our points across, and that, again, deals effectively with those who are mentally stable as well as those who are mentally ill.

Q. You need to communicate differently with the mentally ill, Don't you?

A. I don't think so.

Q. Doesn't CIT training require that you treat and communicate with the mentally ill differently?

A. CIT training by its name is Crisis Intervention Training. Some of the people that come into contact with the police are mentally ill; some of them are not. That training encompasses both groups.

Q. As an example, Chief, oftentimes when, an officer is in a position where an officer is contacting a member of the public, an officer will strike authoritative poses, use authoritative body language, attempt to control the circumstance. Is that correct, sir?

A. Yes.

Q. Would you agree, sir, that oftentimes the mentally ill find that type of posture [79] threatening and will escalate a circumstance?

A. I would say yes, but then again, so do people who are not mentally ill.

Q. But people who are mentally ill are going to react differently. Aren't they?

A. They may.

Q. And that's something that an officer needs to consider. Correct?

A. But it needs to be considered—I guess what I'm saying is that the way an officer communicates, the way their demeanor their physical stance, all of those things, communicates something to the person they're talking to. And at times that they can be viewed as threatening, at times it can be viewed as being friendly by both groups that are mentally ill and groups that are not.

Q. Anytime one generalizes, there will be exceptions to a generalization. Would you agree that as a general proposition when one is dealing with a mentally ill population, aggressive actions on the part of law enforcement are more likely to engender an aggressive response?

A. I would not agree with that statement.

Q. Are you aware of any studies that address that specific issue?

[80] A. No.

Q. As part of your CIT training, have you reviewed any studies or are you—have you been made aware of any studies relating to that issue?

A. I have never undergone CIT training.

Q. Okay. Who oversees the CIT training for your department?

A. I believe that would be Sergeant Jane Anderson.

Q. Do you know whether the Criminal Justice 1 Institute publications are a part of your library?

A. It could be.

Q. Do you know what the Criminal Justice Institute is? Are you familiar with that?

A. Not offhand.

Q. Do you know whether the Criminal Justice Institute had any role of the development of the CIT program?

A. I don't.

Q. I think I just asked this, Chief, and I apologize because I know I did just ask it. Who is the person most knowledgeable regarding your CIT program?

A. Well, I believe it's sergeant Jane Anderson.

[81] Q. And what is Sergeant Anderson's position with the CSPD?

A. She works out of our training academy, and she is in charge of overall in-service training.

Q. Do you agree that if an officer does not receive proper training regarding the methods to safely contact a person suffering mental illness or behavioral disturbance there is a risk the officer may act improperly and cause harm to either himself or other officers or members of the public?

A. Well, I guess I would go back to what I stated previously. I think that the short answer to that question is that no, I don't think so.

Q. If the failure to properly train an officer regarding contact with the mentally ill would not cause an increased risk of harm to the public, then why offer that kind of training?

A. The training that we offer, particularly the CIT training, is an evolving way of dealing with people. Now, they have specifically outlined that dealing with the mentally ill it works—seems to work pretty well. But the idea of Crisis Intervention Training is to deal with human beings; again, human beings that may be in crisis, but are not considered generally to be mentally ill. But one [82] of—another group is people who are mentally ill who happened to be in crisis as well.

Overall, the techniques taught in CIT training are techniques of communication. They are not specifically techniques to deal with mentally ill people. They are techniques of communication.

Q. Are you saying, Chief, that a law enforcement officer does not need to deal with a mentally ill or behaviorally disturbed person in a different fashion than a stable person?

A. I guess what I'm saying is just that, yes. The training that an officer undergoes in how to deal with people generally will be good enough to put them through dealing with people in crisis who are mentally fine versus people who are mentally ill.

Q. Are you saying, Chief, that an officer does not need to alter or amend the way they're interacting with a member of the public when that officer believes the person to be mentally disturbed?'

A. No, I'm not saying that.

Q. Okay. In what way does an officer need to amend his or her behavior when contacting a member of the public they believe to be mentally disturbed?

A. They need to alter their contact based on that individual, just like they would alter their [83] contact based on dealing with a neurosurgeon compared to dealing with a 14-year-old prostitute.

Q. Are your officers given specific training on how to interact with a subject who's hallucinating?

A. I'm not sure.

Q. They can interact the same way with someone who is hallucinating as they can who is the normal person. Can't they, sir?

A. Well, they can, but they may not get an optimal result.

Q. Okay. How about dealing with somebody with paranoid tendencies? Are they trained for that?

A. Is every officer trained for that?

Q. Yes, sir. Every Colorado Springs Police Department officer, are they trained—let's make this specific—as of May of 2003 to deal with somebody that has paranoid tendencies?

A. I can't tell you that we are trained to deal with individuals who have paranoid tendencies.

Q. Are you training your officers to even identify that?

A. There's a great many behavioral traits that people who are paranoid may exhibit.

Q. What are some of those? Page
[84] A. Well, I'm not a psychiatrist and I'm not a psychologist and neither are our police officers.

Q. But they're professional law enforcement officers that interact with the public, and in this city a significant portion of that public are people that have mental illnesses. Correct?

A. That's right.

Q. All right. And part of what your training is all about is assisting those officers and I interacting with the public in a way that's safe for the public and safe for the officer. Correct?

A. That's correct.

Q. Okay. And I'm not asking you to judge whether it's appropriate or inappropriate to give them training regarding specific mental illnesses. I'm asking you to tell me whether they are or are not given that training. Is that fair, Chief?

A. Well, I don't know if it's fair.

Q. Okay.

A. The—what you're asking is a particular category, in this case, paranoia.

Q. That's right.

A. Are we trained to deal with individuals that are paranoid? And I can't tell you if we are specifically trained to deal with individuals who are

[85] paranoid just like I can't tell you if we are trained specifically to deal with the people who are having delusional problems.

Q. Who can tell me that?

A. I don't know that anybody can tell you that in our organization.

Q. Would the person giving the training be able to tell me that, sir?

A. No, I don't think so.

Q. Why?

A. Well, again, I think you're asking if we are training for particular categories, and my answer is that I do not believe that we train for particular categories.

Q. My question was actually a little bit more specific than that, Chief, and that is: Are you trained to discern or recognize the specific categories? Then the second corollary to that is: Then are you trained to interact with people falling within those categories?

A. And my answer is: I don't believe we do.

Q. Do you agree that the way an officer reacts to a situation involving a mentally ill person is paramount in either resolving a crisis effectively

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[102] as of 8/12/02. Do you know whether this order was in effect in this form as of May 3rd of 2003?

A. It appears that it was, yes. Well, let me—

Q. Sure. Go ahead.

A. I'm sorry. You said 2003.

Q. Yes.

A. Again, I would have to say that I don't know when this particular copy was made, but particularly in this year we were updating all of our general orders, and I don't know if this is the most recent copy of this general order.

Q. To the extent that both General Order 720 and General Order 705 as reflected in Exhibit 1 and Exhibit 2 were made a part of the Critical Incident report, you would anticipate that these are the versions of the general orders that were in effect as of the incident involving Mr. Herring.

A. Yes.

Q. In paragraph .03 there's a sentence, "Police agencies have an obligation to provide their employees with the policies, training, and tools necessary to accomplish their mission." Do you see that, sir?

A. Yes, sir.

[103] Q. And do you agree with that statement?

A. I do

Q. And would you agree, Chief, that that obligation extends not only to police officers, but to the public as well?

A. How would you propose that it deals with the public?

Q. Okay. The obligation to properly train your employees, which is what that—

A. Uh-huh.

Q. —sentence is referring to, part of the reason that there's an obligation to properly train your employees is so that your employees can properly protect themselves and to deal with the situations they encounter. Correct?

A. Yes.

Q. And that—and I know this is a parochialism. But if they're not properly trained, law enforcement officers can be hung out to dry in a situation. Right?

A. Yes.

Q. Okay. And you don't want that to happen to your employees. Correct?

A. Correct.

Q. And that's part of the reason why you [104] have an obligation to train them.

A. Okay.

Q. Is that a yes?

A. That's a yes.

Q. Okay. And I'm sorry. In a deposition, "okay" can on a transcript not look real right.

Would you also agree that part of your obligation to train your employees is to protect the public from the risks that could occur if your employees were not properly trained?

A. Well, I guess I would have to say yes.

Q. And part of what struck me, Chief, as I read this order is that the entirety of this order is geared toward the department's obligation vis-a-vis its employees, but I don't see anything within this general order that discusses the department's training obligation as it relates to the public. Is that a fair characterization of this document?

A. That would be a fair characterization.

Q. Is there another document that identifies the policy of the Colorado Springs Police Department relating to training its employees as a matter of protecting the, public as opposed to officers?

A. No.

[105] Q. Is there a reason why no such document exists?

A. I have never ever been involved in a discussion to that extent in my 30 years on the department until this moment.

Q. Okay. And, again, sir—and again, I don't mean to argue with you, but I don't know whether that answers my question. I know that there has never been a discussion on it because you just told me that, but is there a reason why there has been no discussion?

A. I can only assume that our general orders are promulgated for our personnel. They are not promulgated for the citizens of our community, but only for our personnel, and that's why I think the verbiage is geared towards our personnel. In other words, it's an introspective look and not an -what would the term be?

Q. Extrospective?

A. Extrospective.

Q. External view?

A. External view, yeah.

Q. Okay. Wouldn't an introspective analysis of the obligations of the Colorado Springs Police Department and its individual officers include

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[110] escalating force is that an officer explore options associated with how he can interact with the person before going to the next level of force. Correct, sir?

A. Well, explore is the operating word in what you just said. And if an officer has time to explore his options, then usually it's a good outcome. What generally happens is that an officer reacts to something that is being done by the other individual. In the case that I gave, at every stage, if we were to break down that contact at every component, the officer's actions were based on the actions of the subject. And therefore, his exploration of options become more and more finite, more and more limited as things escalated.

Q. And part of that example and part of what you just discussed generally, what the determining factor was or what a determining factor was was the amount of time that the law enforcement officer has to consider and attempt other actions prior to escalation. Correct?

A. Yes.

Q. All right. So in the example that you gave, the officer gave commands. Commands weren't followed. That option is taken away. Now, he's [111] looking at other options. Correct, sir?

A. Yes.

Q. And you would agree that in the example that you gave the officer, unless there was something different than the example you gave, wouldn't go directly from giving commands to unholstering his firearm. Correct?

A. That's correct.

Q. Okay. That there was time in that circumstance given the responsiveness of the other party for that officer to understand, make assessments, and escalate. Right?

A. Yes.

Q. Okay. And you would be critical of an officer that went directly from commands to drawing the firearm.

A. Well—

Q. Under the circumstances you've given.

A. Yeah. Under the circumstances I just gave, I would be critical of an officer going to that level of force.

Q. Would you agree, sir, that there are certain persons that cannot understand or properly respond to an officer's commands?

A. I would agree that there are certain [112] people that cannot or will not respond to an officer's commands.

Q. Okay. There's plenty of people that will not. I'm not talking about them. I'm talking about the group of people that cannot understand or respond to an officer's commands.

A. There are people that cannot.

Q. Okay. And among them would be the disabled. Correct, sir?

A. Depending on what they're being asked to do.

Q. That's right. For example, if a person were a paraplegic operating a motor vehicle and that paraplegic were instructed to stand up out of the car, that person couldn't do that. Right?

A. That's correct.

Q. And as another case that Iliad against the Colorado State Highway Patrol, a guy that had his aim tore off and reattached and he was told to put his hands up and couldn't do that.

A. Yes.

Q. So it would depend upon the unique disability of the individual involved with the interaction with the law enforcement officer. Correct?

[113] A. Yes.

Q. And that there are certain circumstances under which the mentally ill are not able to understand or appreciate an officer's commands sufficient to do what that officer wants. Correct?.

A. I would imagine so.

Q. Are your officers trained in how to handle a situation like that?

A. A situation in which they are dealing with a person with &known mental disability?

Q. That's right.

A. Some of our officers have more training than other officers.

Q. Okay. Let's talk about not specially trained officers, not an officer that would belong to, for example, CIT.

A. Right.

Q. Let's talk about your front line officers out there driving around in cars, squad cars, trying to protect the public.

A. Okay.

Q. If those officers encounter a circumstance where they have good reason to believe that the person that they're encountering' has some kind of mental illness, are they trained to take that [114] into account in determining whether that person can respond or not respond to their commands?

A. Well, I believe they are trained to try to recognize that first they are dealing with a person with a mental illness, and secondly, to try to employ other options at their disposal. If they have time, one of those options would be to contact other people in our organization that might have some further training.

Q. Who as of May of 2003 had the most training in your department as it relates to interaction with the mentally ill?

A. Our negotiators.

Q. Who would they be?

A. well, we have a number of negotiators on the department probably totaling in the area of 15 officers.

Q. Okay. So there is—there are a number of officers available with that Special expertise. Correct?

A. Yes.

Q. Would it be fair to say that when looking at escalation options, and we've discussed how important timing issues are in relation to escalation, one of the options that an officer should [115] consider unless time dictates that they can't do it when they believe that they're dealing with somebody that may have a mental illness is. to call those persons who have some training in dealing with the mentally ill or negotiation.

A. If they have the time, then yes, by all means.

Q. And that was true as of May of 2003?

A. Yes.

Q. On page 2 of Exhibit Number 2, paragraph .10, "The use of force continuum uses a model which requires selection of the least violent means available relative to the situation." Do you agree with that policy?

A. I agree with the general statement.

Q. If an officer selects a violent means in relation to a circumstance which was not the least violent means available relative to the situation, would you be critical of that officer?

A. Yes.

Q. Going down to .20 specifically addressing the use of force continuum, the first is presence and appearance, and it refers to both the officer's demeanor and the officer's attitude. Correct?

[116] A. Yes, and their legal right to be there.

Q. Okay. And I'd like to focus first on demeanor and attitude, if we may, Chief.

A. Sure.

Q. Is there a general demeanor or attitude that law enforcement officers with the CSPD are trained to utilize when they go into a situation? And let me kind of throw out an example that may help you answer my question.

A. Okay.

Q. I've heard the term command presence before, which I understand to mean that an officer can often defuse a situation by assuming a body posture, a tone of voice, an attitude where they are in control of the situation and people in relation to the situation, Is that a fair statement?

A. That's a fair statement.

Q. Okay. And you would agree, sir, that assuming that command posture, again as a general matter, is

how law enforcement officers act when they approach a scene.

A. Yes.

Q. Okay. And you would also agree, sir, that there are circumstances in which that posture can be counterproductive. Correct?

[117] A. Yes.

Q. And among the situations where that posture may be counterproductive is where one is dealing with a mentally ill person that may have an adverse reaction to that type of posture.

A. That could be one of the circumstances, yes.

Q. And where an officer has reason to believe that they are going to be encountering a mentally ill person on a call, one of the things they need to consider is whether that command posture would have an adverse effect on the person they're contacting.

A. Well, there we get into a real—that's a difficult question to answer. Because even if I had prior knowledge that I'm dealing with a mentally ill person prior to my arrival at a scene, the command presence that you're talking about, part and parcel of that is just your being there, the fact that you're in a uniform. Sometimes just those things are enough to set somebody off. The fact that they see a person in uniform is enough to set somebody off. And whether they be mentally ill or not, that might enough to trigger a reaction on somebody's part. You don't even get the chance to [118] have that command presence that you're describing. So it becomes a difficult question to answer.

Q. And law enforcement officers, unfortunately, are faced with difficult questions every day that they do their job. Right?

A. Yes.

Q. And even though they're forced with difficult decisions every day, you expect the officers within your department to approach those difficult decisions in a professional manner based upon the training that they've received. Correct?

A. Yes.

Q. And part of that is to consider how the way they are being or how the way they approach the situation and present themselves, how that will affect members of the public, including persons they're contacting. Correct?

A. Yes.

Q. And in fact, Chief, that's part of why as part of the CIT program your officers are trained to reduce stimuli when they enter a situation where an officer is encountering somebody who's mentally ill. Right?

A. Well, again, I have never undergone CIT training, so I don't know that that's part of their [119] training.

Q. Okay. I apologize, Chief. You told me that and I shouldn't have asked that question.

And you would expect, sir, that if an officer is walking into a situation where they believe that they're interacting with a mentally ill person, they will at least consider how their posture and how their body language, how their tone of voice is going to affect that person.

A. I think that would be fair to say, yes.

Q. We're next speaking of the legal right to be there. Are there circumstances under which an officer may make a warrantless entry into a home?

A. Yes.

Q. Are there circumstances where it's inappropriate for an officer to make a warrantless entry into a home?

A. Yes.

Q. Do your officers receive training in that regard?

A. Yes.

Q. Under what circumstances is it appropriate for an officer to make a warrantless entry into a home?

A. Well, there would have to be some [120] exigent circumstances for an officer to be able to make that kind of decision. Generally, there is some action that the officer believes is taking place that's putting somebody at harm or in harm's way. There might be property being destroyed. Those are just some examples. But really, the operating term is there has to be exigent circumstances that the officer can later articulate to make a warrantless entry into a home.

Q. And absent those exigent circumstances, it is inappropriate for an officer to make a warrantless entry into a home. Correct?

A. In the United States, yes.

Q. Okay. And that's what Colorado Springs is. Right?

A. Yes.

Q. All right. When an officer makes a warrantless entry into the home of a mentally disabled person, are there certain considerations) that an officer needs to make in that regard? In other words, are there different circumstances he needs to consider or she needs to consider?

A. No.

Q. Can the display of a defensive position 5 or the display of a defensive weapon affect a [121] mentally ill person differently than it would a mentally stable person?

A. It could.

Q. Is that something an officer needs to consider when responding to a call where that officer believes he may encounter a mentally ill person?

A. Well, I think an officer if—again, if he has knowledge of a person's mental illness, then that may be something that he would consider, he or she.

Q. And Chief, I'll understand if the pejorative he is used, you're not trying to exclude female officers.

Do your officers receive training as to how OC sprays affect mentally ill people?

A. I don't know that we receive training on how they affect mentally ill people. They do receive training on how they affect people.

Q. Okay. Are you aware of any studies promulgated by the manufacturers of the chemical sprays—and I don't know specifically whether they're OC sprays—that address the use of chemical sprays with different normative populations?

A. No.

Q. Would that be something that you as a

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[134] Q. Do you prefer Chief or Doctor?

A. Right now, Chief.

Q. Okay. Are you familiar with the American Society of Law Enforcement Trainers?

A. Yes.

Q. And what is that group?

A. Well, as I understand it, it's a group that is composed of individuals that are involved in specifically the training field for law enforcement throughout the country.

Q. Is it your understanding that persons involved in that organization would have some type of special expertise as it relates to training police officers?

A. Yes.

Q. Have you ever been involved with that group?

A. No.

Q. Have you attended any lectures or presentations by that group?

A. I don't believe that I have, no.

Q. Have you reviewed any literature from that group, particularly as it relates to police contact with the mentally ill?

A. No, sir.

[135] Q. As of May of 2003, did the Colorado Springs Police Department have any written policies or procedures as it relates to officer interaction with the mentally ill?

A. Yes, I believe we did.

Q. Okay. And could you relate to me the content of those policies or procedures?

A. I'm not sure I could relate the content. I do believe that we had a general order specifically entitled special populations that would deal with individuals that have either disabilities or are mentally ill.

Q. And Chief, as we discussed previously, you don't know the number of that Special order, but there are folks within the CSPD that would.

A. Yes.

Q. Okay. And it's also fair to say, Chief, that although you have an understanding that that order exists, you can't as we sit here today relate the content of that to me.

A. Yes, that's correct.

Q. Excluding anything that your lawyers told you, did you have an understanding regarding the issues of this case before you came into the deposition?

[136] A. Well, I think personally in my own mind I had an idea of what could potentially be some of the issues surrounding this case.

Q. I know that at the beginning of this case that you contacted folks associated with training of your officers to get information and asked questions about the use of force in particular, or at least that was volunteered to you. Did you understand CSPD contact with the mentally ill is a large portion of the subject matter of this lawsuit?

A. Well, I certainly have gathered that from your questions today.

Q. Prior to me asking the questions?

A. No.

Q. Okay. So pail of the reason I'm asking these questions the way I am, Chief, is you didn't make any attempt, for example, to take a look at the general order regarding special populations or you didn't take a look at the CIT materials, which suggests to me that I'm kind of catching you, at least in some respect, flat-footed on these issues. Is that fair?

A. Well, as it pertains to the fact that the subject here was mentally ill and that was obviously a big portion of this action, yeah, it [137] wasn't anything that I had—had looked at. I thought it was an issue of use of force and, for that matter, as we got into some of the questions, the issue of police custody. I thought could—might be an issue in the case as well.

Q. Thank you, Chief. I appreciate that.

Prior to the institution of the CIT program, can you tell me what training your officers received as it relates to interaction with the mentally ill?

A. It was not so much training to deal with the mentally ill as it was training to communicate with individuals, and the mentally ill being part of, obviously, individuals.

Q. Are all of the training materials that CSPD officers receive from—I don't know—the year 2000 forward. contained in the computer?

A. All of the training materials?

Q. Yes, sir.

A. I don't know that they would-be contained in the computer. The training materials are different from our general orders and SOP's.

Q. Let me ask it differently then. In this case, I am particularly interested in how officers were trained on certain issues. When officers

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[166] Q. Okay.

A. He is nude.

Q. Okay.

A. He is causing property damage.

Q. Okay.

A. Those are not normal behaviors.

Q. Absolutely not normal.

A. And the police have been called to the scene, and I'm assuming not by that individual.

Q. Okay.

A. They are there to investigate and to make an initial assessment of what's going on. Those would all be reasons to get in there and find out what's going on. Number one, I, as a police officer, would not know if other individuals are in that apartment and are potentially being harmed or have been harmed.

Q. What if you've been told that and you've made that determination? What if you could look in -that apartment and see in addition to being told?

A. Well, I'm sure I can't see everywhere. I would not be able to see closets. I may not be able to see rooms, and I would want to see them firsthand, so I would have to make entry.

Q. Chief, but if you follow that logic, [167] then every contact—every police contact would be an exigent circumstance. Doesn't it actually work in the

reverse, that before you can enter a home, you've got to have probable cause that there is an exigent circumstance, that there is somebody in that home? And when an officer's been informed directly of the opposite, wouldn't your logic make every circumstance an exigent circumstance?

A. Well, given these circumstances, I'd say that there are exigent circumstances.

Q. Okay.

A. Now, I agree with you that not every contact has exigent circumstances for an officer to go into somebody's home. But these in my mind would have caused me to want to get into that apartment and find out if anybody was in there, if anybody was hurt. If this individual has already been hurt, I'd like to know what caused him to get hurt, whether it was himself or somebody else.

But there are enough unknowns that need to be answered. And of course, that's not—I mean, if I remember right, my recollection is that he was carrying on quite a bit. I mean, he was thrashing things around and so forth. So it's not that he was docile. And certainly once the officers got in, he [168] became anything but docile. So at that point, it was a self-fulfilling prophecy, if you will, that led everybody down a path that I'm not sure any of them I. wanted.

Q. And I think factually once the officers kicking the door and the confrontation begins there's no turning back because you've got a person who is mentally disturbed and couldn't make the judgments, and you had officers escalating, trying to protect themselves and other officers. But before that I point, your officers had a series of decisions to make. Correct, sir?

A. Yes.

Q. Okay. And to the extent that they were armed with knowledge that the person that they were encountering was suffering an acute mental health crisis—

I don't know.

MR. WHITE: At this point, I'm going to object. We've been kind of letting this go on. There is no evidence in the record that Mr. Herring was suffering anything, you know.

MR. FRANK: There isn't?

MR. WHITE: No, there isn't. Not in this record at all.

[169] MR. FRANK: Okay.

MR. WHITE: And if he was, we certainly don't know what it is. At least it's not in any evidence now. But you can assume that if you want, but there is no evidence to—

MR. FRANK: Okay.

MR. WHITE: —establish that that I've actually seen or heard.

MR. FRANK: Objection noted. All right? It's a form objection.

Q. BY MR. FRANK: Frankly, Chief, it's all over the record. Let me rephrase my question. Let's assume that these officers knew, as it's reflected in their own reports, that Mr. Herring was suffering from an acute mental health crisis. That's a factor that these officers should have considered before they kicked in his door. Right?

A. If they knew, then that would be a factor that they would have considered.

Q. And how he would react to that type of aggressive activity would be something they would need to consider. Right?

A. I don't think our officers had an idea as to how he would react by them entering that house.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

DEPOSITION OF GARY DARRESS
October 6, 2005

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[10] A. Yes.

Q. In relation to the videotape, are you referring to the videotaped interview that was conducted by a member of the district attorney's office and an officer subsequent to the interaction with Mr. Herring?

A. Yes.

Q. And when you did that video were you trying to be truthful the entire time?

A. Yes.

Q. And you have had a chance to review that video, correct?

A. Yes.

Q. When did you review the video?

A. Yesterday.

Q. Were the statements on that video true in the same fashion they would be true if you were under oath?

A. Yes.

Q. And sitting here now that you're under oath, do you adopt the statements made in that video as if they were under oath?

A. Yes.

Q. Is there any statement that you made in the videotape which is untrue?

[11] A. No.

Q. Is there any statement in the videotape that after reviewing the videotape you wish to alter or amend?

A. No.

Q. At various points in the videotape you demonstrate things, body positions, you demonstrate certain things that you did. To the extent that you were attempting to demonstrate things on the videotape, were you attempting to as accurately as possible re-create what was going on?

A. Yes, because I knew it was being videotaped.

Q. And so to the extent that you knew it was being videotaped and you were doing something demonstrative, you knew that it would be taped and potentially reviewed by district attorneys and investigators and lawyers?

A. Yes.

Q. Did you make any notes or prepare any memoranda as it relates to your review of the videotape or any other document?

A. No.

Q. Did you review any policies or procedures of the Colorado 'Springs Police Department [12] in relation to preparing for this deposition?

A. No.

Q. Did you review any literature relating to law enforcement interaction with the mentally ill prior to this deposition?

A. No.

Q. Can you identify for me that general order or those general orders of the Colorado Springs Police Department that relate to the mentally ill?

A. By specific number?

Q. Yes, sir.

A. I'm not able to do that.

Q. Okay. Part of the difficulty I have had in this case, Officer, is that I have asked both orally and by way of interrogatories for the specific numbers of those things dealing with the mentally ill and 1 have-not gotten any numbers. Is there a reason why you didn't go back and take, a look specifically for those general orders?

A. I don't understand why you're asking that question.

Q. Okay. I haven't gotten that information. I have requested that information. I'm trying to figure out whether there's some [13] barrier to giving me that

information that I can work around. So is there a particular reason why you haven't done a search for those items?

A. No, because I have a working knowledge of my general orders and SOPS of the police department.

Q. Okay. So is there a way for you to, describe the general orders that relate to interaction with the mentally ill?

A. Sure.

Q. Okay. Why don't you generally describe those orders to me.

A. I believe that there is a policy that relates to special victims or people who have mental illness, and it basically states that police will deal with people of special populations accordingly and police will intervene when an individual who falls underneath that policy is a danger to himself or others.

Q. Okay. What does it mean to deal accordingly with a member of a special population?

A. Well, you would treat that individual the same as somebody that you come in contact with every day, but you're going to handle the situation that you—that you're confronted with

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[18] to criminal activity, as well as functions that would relate to an individual conducting law enforcement activity on a military installation.

Q. Were you given training as it relates to the use of force?

A. Not that I can recall.

Q. What type of discharge did you receive from the Air Force?

A. Honorable with the ability to reenlist.

Q. Where did you take your civilian police training?

A. Colorado Springs Police Department.

Q. And when did you take that training?

A. Well, I was a reserve officer for the police department, and so the first police academy I went through was in, I believe, 1983 or 1984.

Q. Now, when you say the first academy, it would suggest to me that you took subsequent academies. Am I correct or incorrect?

A. Correct.

Q. So your first academy was 1984. When were your subsequent academies or academy?

A. Well, the first one was specifically for a reserve position on the police department. The second one was when I was hired on February 10th of [19] 1986.

Q. Okay. The training program that you did in 1983/1984 for the reserve position, how long was that program?

A. I can't recall. Several months, I guess.

Q. Okay. Was the training program you received for the reserve position substantially different from that that you received when you were D actually hired?

A. No.

Q. Was the training that you received when you were actually hired a repeat of the training you received in relation to the reserve position?

A. It was very similar.

Q. Describe to me the difference between a reserve position and an actual hire.

A. The reserve position falls under a different state statute in regards to, I believe, the level one police officer, and I think a reserve officer might have been a level two or level three. So when you were a reserve officer you worked with an active duty officer under the police department's policies and proce-

dures, but you had the same arrest authority as a level one police officer.

[20] Q. The training that you received as it relates to your reserve position, do you recall -receiving any training relating to dealing with special populations?

A. Not that I can recall.

Q. Okay. Do you recall whether you received any training when training for the reserve position relating to dealing with the mentally ill?

A. No.

MR. FRANK: Okay. If we could go ahead and . . .

(Marked for identification Exhibit Number 1.)

Q. (By Mr. Frank) Officer, can you identify what's been labeled as Exhibit 1?

A. It states "Colorado Springs Police Department Training Division, February 10th through May 2nd, 1986."

Q. I'll represent to you that this was attached to your discovery responses. Did you provide this to the city attorney's office?

A. No.

Q. Do you recognize this document?

A. Not really.

Q. Okay. My understanding is that this is [21] a calendar syllabus relating to the training received for the Colorado Springs Police Department for the period of time February 10th to May 2nd, 1986. Does that appear to be an accurate description of the document?

A. According to your statement, yes.

Q. Okay. Reviewing this document and the contents of the document, can you recall whether this appears to be the training that you received. upon joining the force on February 10, 1986?

A. It appears to be similar to that.

Q. Okay. I have reviewed this document and I don't see anywhere on this document where you received any training as it relates to contact with the mentally ill or special populations. Can you review this document and see whether I have missed something and identify whether there is such a section?

A. Specifically looking for again?

Q. Any training as it relates to contact with special populations or the mentally ill. It could be I just missed it, Officer, that's why I'm asking you to take a look for me.

A. Could you repeat the question, please?

Q. Sure. I looked through the syllabus and [22] I could not readily identify training specifically directed towards contact with special populations or the mentally ill. In your review of the syllabus, do you see such training reflected?

A. In a general sense, yes.

Q. Okay. Good. Well, tell me what you're looking at and I'll take a look at it myself.

A. I see on Wednesday, March 5th, there was a section from 10:00 a.m. to 11:50 a.m., I believe. It says "Mentally Solomon."

Q. Okay. So Wednesday, March 5th, 10:00 a.m. to looks like noon, "Mentally Ill." Do you recall what training you received in that regard?

A. I do not.

Q. Other than that two-hour block of time, do you recall receiving any other training during this particular training period as it relates to the mentally ill?

A. I do not.

Q. Do you recall the content or subject matter of this particular training session?

A. I do not.

Q. Do you recall whether you retained any materials relating to that particular training session?
[23] A. I do not.

Q. Subsequent to your training academy in February of 1986, have you had additional training?

A. In reference to?

Q. Your position as a law enforcement officer.

A. Yes.

Q. Okay. Tell me about your additional training.

A. This is not in any type of order. Obviously there's 20 years on the police department with numerous seminars I have attended or training classes. One has been in sexual assault investigation. Interview and interrogation. Drug DARE training, D-A-R-E training, for drug abuse education training. There has been bicycle training. I was on a bicycle patrol for several years. I have been to crisis intervention team training. Crime scene investigation training.

And that's—I'm sure there's other areas of training that I have attended. I just can't recall anything.

Q. Would it be also fair, Officer, to state that you also receive training in your morning briefings and training materials and sometimes [24] videos are used to educate you as an officer?

A. Yes.

Q. And that that's a fairly consistent and constant process; is that a correct statement as well?

A. Yes.

Q. Okay.

(Marked for identification Exhibit Number 2.)

Q. (By Mr. Frank) Could you please identify Exhibit 2?

A. This states that this is an individual training record, and it appears that this is a training record that is associated with me.

Q. Okay. Have you seen this document before?

A. Yes, on the computer.

Q. Okay. This was also tendered in relation to your discovery responses. Did you prepare this document?

A. No.

Q. Okay. It seems to have two columns, an in-service class record and an elective class record. Is that a correct characterization?

A. Yes.

[25] Q. And does this document appear to reflect all of your in-service and elective training?

A. For the period shown.

Q. What is the period?

A. Looks like the earliest date on this record indicates or shows May 7th, 2003 and the most recent date on this was September 20th, 2005.

Q. So it's a fair statement that any training that you had prior to May 7th of 2003, whether it be in-service training or elective training, is not reflected on this document?'

A. Yes.

Q. Do you know whether that information is contained within the computer?

A. No.

Q. On the left-hand column on the date 3/2/05 you had FATS training. What is that?

A. That acronym, I believe, stands for—I can't give you the name, but I believe that would be firearm—it's Firearms Training Simulator. That's what that stands for.

Q. Okay.- I would like to discuss a little bit with you the crisis intervention training you had in September of 2004. But before I do that, let me back up.

[26] Other than the two hours of training that you had in the academy as it relates to the mentally ill

and up to September 20, 2004, had you had any other training as it relates to contact with the mentally ill?

A. Not that I can recall.

Q. It is fair to say, however, as you indicated previously, as an experienced law enforcement officer, you had contacted the mentally ill on prior occasions?

A. Yes.

Q. And in your career, how many times can you estimate that you have contacted the mentally ill?

A. Well, that would be hard to say. I have come in contact with thousands of people over, you know, the 20 years. But I guess I'm not in a position to say that I have contacted people who have been diagnosed with mental illness until I have talked to a mental health professional.

Q. Let me back up and ask it this way: Officer, would you agree that oftentimes, unfortunately, law enforcement officers are first responders to situations involving the mentally ill?

A. Yes.

[27] Q. Would you agree that pail of your job as a law enforcement officer, before you go into any situation, is to make those assessments that are appropriate to protect you, to protect suspects, to protect victims, and to protect the public?

A. Yes.

Q. Would you agree, sir, that as part of those assessments you need to figure out oftentimes, to the extent you can, what you're dealing with, right?

A. Yes.

Q. And as part of those assessments, there are times when a person is exhibiting unusual or bizarre behavior, correct?

A. Yes.

Q. And when a person is exhibiting unusual or bizarre behavior, you need to make assessments as

to how to deal with that particular person, is that correct?

A. Yes.

Q. Would you also agree that part of making an assessment to have to deal with that particular person is to make an assessment as to whether the person may be experiencing some type of acute mental illness or breakdown?

[28] A. Yes.

Q. And part of the reason you need to do that is officer safety issues, correct?

A. Yes.

Q. Part of the reason you need to do that is to protect the safety of the subject you're contacting?

A. Yes.

Q. Part of the reason you need to do that is to protect the safety of citizens other than the person you're contacting?

A. Yes.

Q. And part of that reason is so that you can form assessments as it relates to what you need to do with the person, whether it's to take them to jail or to take them to Lighthouse or another mental health treatment facility, correct?

A. Yes.

Q. Okay. So even though you don't make determinations as to diagnoses, you do make determinations and assessments as a law enforcement officer as it relates to mental illness for the purposes of doing your job, right?

A. Yes.

Q. All right. So restricting my question [29] to that type of assessment as opposed to a diagnosis, how often do you come into contact or over your career have you come into contact with folks where you have made the assessment this person has a

mental problem and. I've got to deal with that problem?

A. Couple hundred maybe.

Q. It's not an unusual thing for a law enforcement officer to have to cope with, right?

A. Correct.

Q. And part of the reason that officers receive training and receive continual training is to equip them with the knowledge that they need to properly deal with the circumstance, correct?

A. Correct.

Q. And that part of the risk of not training an officer to deal with the situation is that the officer, even when the officer is exercising their best judgment, just may not have the tools necessary to react properly in a given situation, right?

A. Correct.

Q. And that's why most law enforcement officers and most departments take training real seriously, correct?

* * * *

[46] how to interact with a mentally ill person who has expressed a fear of law enforcement?

A. Not that I can recall.

Q. Okay. Were you given training specifically on special concerns as it relates to engaging in physical confrontations with the mentally ill?

A. Repeat the question.

Q. Sure. Were you given any training as it relates specifically to the dangers to officer safety and to the suspect of engaging in physical confrontations with the mentally ill?

A. Not that I can recall.

Q. You weren't given any training as it relates to. how they may or may not be more or less sensitive to pain?

A. No, not that I can recall.

Q. No training as to whether they will or will not tire or may not tire as easily as a normal suspect?

A. No.

Q. Okay. Any training relating to they may seem stronger or more powerful than a person ordinarily would?

A. Not that I can recall.

[47] Q. As part of your training as to how to approach the mentally ill, did you receive any training regarding the importance of maintaining a distance from the mentally ill person?

A. Not that I can recall. Just the mere fact that you need to always approach a situation that you keep your safety in mind and that individual's safety and other people in the area.

Q. Did you receive any training on the effects of sudden movement on the mentally ill?

A. I can't recall.

Q. Did you receive any training on escalation versus deescalation as it relates to the mentally ill?

A. I believe those were in some of the scenarios that we took part in.

Q. Okay. Describe to me the scenarios involving escalation/deescalation.

A. It was just interacting with an actor portraying somebody who is suffering from mental illness and dealing with that situation. And depending on how you approached and your tone and maybe your mannerisms, that person would react toward that.

So if—you know, as I said earlier, if [48] the person that you are confronted with is acting in a strange or bizarre behavior and they're not focusing on you and you're trying to get their attention, one technique was to clap several times or once to distract them

from what they're focused on doing so they can focus on you.

Another one was to raise your voice or to lower your voice as to how they're reacting to that, just like if you were dealing with somebody who is not suffering from mental illness.

Q. In dealing with the mentally ill, is there an importance in maintaining verbal communication with them?

A. I think that would be situational.

Q. Okay. I have heard a number of officers that I have deposed indicate that time is on the side of the officer, and that is that if an officer can stretch out the time frames within which things occur, that's of benefit to the officer and gives the officer more options. Do you agree with that statement?

A. That's situational.

Q. Okay. If you have a suspect who is actively engaged in discussions with you, they're talking to you, is that normally a good thing?

[49] A. Yes. But it's also situational as to what they might be doing at the same time talking to you.

Q. Okay. I understand that. And I understand that you can add a hundred different variables that are going to affect things, but I'm talking about just generally when somebody is talking to you, that's something that you as an officer encourage, correct?

A. Correct.

Q. All right. So when you go up to a. suspect, if that suspect is speaking with you, as opposed to running away, as opposed to attacking you, that's something that you're going to try to facilitate and encourage to occur, correct?

A. Correct.

Q. Did you receive training as it regards to or relates to the importance of maintaining that type of dialogue with the mentally ill?

A. Yes.

Q. What is the importance of maintaining that type of dialogue with the mentally ill?

A. To continue to talk to them to either deescalate the situation and then to find out what they might be dealing with and then to, you know,

* * * *

[54] 3?

A. It says "Arrest Control (Alternatives to The Use of Deadly Force.)" And the instructor on this topic was Officer Corey T. Compton of the Colorado Springs Police Department.

Q. Have you seen this document before?

A. No.

Q. Do you recognize the writing in the upper right-hand corner of that first page?

A. No.

Q. Were you part of the 2005 recruit class?

A. No, I was hired on in 1986.

Q. Did you instruct the 2005 recruit class?

A. No.

Q. This was attached to your discovery responses. I don't know what it is or why it was attached. Can you help me out?

A. I didn't provide it.

Q. Have you ever seen it before?

A. No.

Q. Have you ever taken the Arrest Control (Alternatives to the Use of Deadly Force) class by Officer Compton?

A. No.

Q. Can you take a look at the content of [55] this

document and tell me whether you ever received training as to the content of this document?

A. I have received training in the use of OC aerosol. And that's a subject in this curriculum. And I believe during some type of in-service training we have discussed what they have down here as positional asphyxiation or positional asphyxia.

Q. Okay.

A. And then—because it looks like, in general, what they have categorized here is sudden custody death syndrome, but it was not part of the same class, it was different classes.

Q. Did you receive training in sudden custody death syndrome?

A. I have received—I either received or attended training. I don't think it was—when attended, I don't think it was called sudden custody death 'syndrome at that time. But it appears to be in regards to people who have died after they have been in custody.

Q. I apologize for jumping around, but I want to ask you a couple of specific questions in relation to Mr. Herring. My understanding is that the physical confrontation with Mr. Herring was a [56] quite vigorous physical confrontation?

A. Yes.

Q. And it's my understanding that he fought with you guys for, quite a while and then at some point calmed down?

A. Yes.

Q. Okay. Did lie calm down pretty quickly when he began to calm down?

A. It was after medication was given to him he calmed down.

Q. Okay. How quickly did he calm down? That's what I'm trying to identify.

A. Within a minute after medication was given.

Q. Okay. So he became tranquil fairly quickly after that point?

A: Yes.

Q. Okay. Thank you. All right. Under the sudden custody death syndrome, you- have identified that you received some training in positional asphyxia. That is with when the body position interferes with breathing, is that correct?

A. Yes.

Q. What type of body positions interfere with breathing?

[57] A. A situation where an individual has been handcuffed and then, as they state down here, at one point in time hog-tied or an individual's legs would be secured and then their legs would be pulled at an angle bent at their knee to where the handcuffs were so they're lying on their stomach.

Q. Did you receive training on neuroleptic malignant syndrome?

A. I never heard of it until you pronounced it today.

Q. Okay. And that's death from an overload on the nervous system due to either mental illness or antipsychotic drugs. You never received training in it?

A. I never knew that was there until you stated that today.

Q. Have you received training in excited delirium?

A. Not that I can recall.

Q. Can you tell me the difference between positional restraint asphyxia and positional hypoxia?

A. I cannot.

Q. On number 6 there is a title with a number of bullet points that says "Risk Indicators."

[58] A. Okay.

Q. Risk of what? Is that risk that somebody is going to die from sudden custody death syndrome or what?

A. I can't answer that because I didn't take this class, nor did I instruct it, so I don't know what the instructors —

Q. Had in mind?

A. —had in mind with this outline.

Q. On number 7 there is a heading that says "Remember These Probabilities. You cannot match strength with them one on one." Who is "them"?

A. I'm not able to answer that. Again, I didn't make this outline and I didn't speak to the instructor who made it, so I don't know what he is referring to.

Q. Is it also fair, Officer, that the training that you did receive, whether it's from this officer or another officer, was not so similar that you can look at this and say, oh, now I know what they're talking about, they're talking about this?

A. That's right.

Q. All right. "Fists and impact weapons are usually ineffective." Again, do you know who [59] that is referring to?

A. No.

Q. Did you receive any training as to whether when somebody is suffering a mental illness, you, as an officer, will have difficulty matching them with strength one on one?

A. Not that I can recall.

Q. Okay. Did you receive training that when you're dealing with a mentally ill person fists and impact weapons are usually ineffective?

A. Not that I can recall.

Q. Is it fair to say that with Mr. Herring you had difficulty matching hint strength one on one?

A. Yes.

Q. Part of that is lie is a bigger person than you?

A. That I can recall, yes.

Q. Is it also your recollection that fists had little effect on Mr. Herring?

A. Yes.

Q. And I believe at one point you did a side chop with your PR-24, is that correct?

A. No, a flat chop.

Q. Flat chop. Excuse me. Thank you. What is a flat chop?

[60] A. It's a technique used with a PR-24.

Q. Can you describe that technique for me, please?

A. You hold the PR-24 in either hand, primarily in your strong band, with the long extended portion along your forearm.. And you're holding the PR-24 by the short handle. And you move the PR-24 downward, it's a flat chop down, making contact along the object or the individual, making contact with that person or object with the long extended portion.

Q. And is that considered an impact weapon when used in that fashion?

A. Yes.

Q. And that didn't have much effect on Mr. Herring?

A. Yes. Correct.

Q. If you turn over to the next page, "Pain compliance techniques are usually ineffective." Again, do you know who that is referring to?

A. No.

Q. Would you agree that pain compliance techniques were ineffective with Mr. Herring?

A. Yes.

Q. The last bullet point is "Sudden [61] tranquility equals death." Do you see that?

A. Yes.

Q. And as we have discussed previously, at some point Mr. Herring became calm in a rapid fashion?

A. In that situation, yes.

Q. Do you know what a total appendage restraining procedure is?

A. I do not.

Q. Number 8 is "Swarm." Is that what you were referring to as a dog pile?

A. I did not use the term "dog pile."

Q. I'm sorry. I thought you had. It may have been a term that I just interpreted. What does a swain mean to you?

A. A large group of people or a group of people.

Q. Would a dog pile be an inappropriate term?

A. I guess it depends on how you're using it.

Q. If you're using it in a situation where you have an overwhelming mass of officers take a subject to the ground and position themselves on top of him, is that a proper or improper term?

[62] A. I have never used it. I don't think—I can't recall I have ever used it. I guess some people have used it, but that's—

Q. You don't—excuse me, I talked over you when I told you I wouldn't, Officer. You don't recall ever using that term?

A. I really don't.

Q. Okay. I think I asked you this, Officer, but I don't recall whether I did. Do you know why this was attached to the responses to discovery?

A. I do not.

Q. Did you ever receive training on the appropriateness or inappropriateness of using chokes on a suspect?

A. Not that I can recall.

Q. Is it appropriate to choke a suspect?

A. I have never done it.

Q. That wasn't my question. My question is, is it appropriate to do that?

A. I don't think I can answer that question.

Q. Okay. And, again, Officer, if you can't answer something I ask you, just tell me that. Okay?

[63] What are the dangers to a suspect when you as an officer strike blows or otherwise have contact with the suspect's neck?

A. It would cause severe injury or maybe death.

Q. Would contact with a suspect's neck constitute the use of deadly force in your mind?

A. It's situational.

Q. Okay. Did you receive training as to how different methods of contact with a suspect's neck could cause tracheal damage?

A. Not that I can recall.

Q. Did you receive training as it relates to different methods of contacting a suspect's neck that may cause a risk of serious injury or death?

A. Again, not that I can recall.

Q. Did you receive any training on how or how not to apply pressure to a suspect's neck?

A. No.

Q. You at some point applied pressure to Mr. Herring's neck, is that correct?

A. Correct.

Q. Was that by way of a specific technique that you were trained to use?

A. No.

[64] Q. Do you have training in any type of martial or combat art other than that received through your employment as a Colorado Springs police officer?

A. No.

Q. I know that a lot of officers nationwide are practitioners of Krav Maga. Are you a practitioner of that art?

A. I never heard of it until you pronounced it today.

Q. Have you received any training as to how OC sprays may potentially affect the mentally ill?

A. Not that I can recall.

Q. Have you received any training as to populations that do not respond in a compliant fashion to OC sprays? Let me ask it differently.

My understanding of the use of OC spray, it is supposed to facilitate a pause in 'combat, is that correct?

A. Yes.

Q. And that that pause is designed to give an officer more options and more opportunities to control the situation, coifed?

A. Yes.

Q. Did you receive any training as it [65] relates to groups or certain classifications of person for which the use of chemical sprays have the opposite effect; i.e., it escalates combat instead of causing a pause in combat?

A. Not that I can recall, just in the fact during the training that different people respond to the use of OC in different ways. The majority of people will stop and respond to being sprayed by the irritant of having OC on them. Other people it's not as effective and can cause somebody to be more agitated.

Q. Did you receive any training as to how mental illness affects a person's response to OC sprays?

A. No.

Q. Could you describe to me the dispatch process for the CSPD?

A. A call is received. That call that's received from the public is first answered by either a 911 dispatcher or an, I believe it's called, emergency re-

sponse technician. Then that information, after it's put into—or collected from the person calling, the police department is then sent to, by computer, to the dispatcher. The dispatcher then receives that call for service.

* * * *

[70] Number 4.)

Q. (By Mr. Frank) Officer, this is what I understand to be the dispatch log as it relates to the incident involving Mr. Herring. Have you had a chance to see this document before? Have you ever seen this?

A. I believe I might have seen something similar to this—it's not the same document—after the incident.

Q. I would like to go through it and just kind of see what you recall by way of items reflected on this document, if I may.

A. Sure.

Q. And I'm referring to—if you'll see on the side of the page, there is a Bates stamp number, and it's PL00365, I believe is the first page.

A. Okay.

Q. If you take a look at PL00366, and you'll see on the just right of the center line of the piece of paper, you have a date, a time, and operator, and then pod. Do you see that?

A. Okay. I see what you're saying, down here where it says "Remarks, Date, Time, Operator Pod."

Q. That's the section I'm looking at.

[71] A. Center of the page.

Q. All right. Do you see the time index 14:34:25?

A. 14:34:05.

Q. 14:34:25.

A. I see what you're saying. Third line down. All right.

Q. And at that point there was a reporting party who was in the reporting party's home indicating there was a suspect outside, is that correct?

A. Yes.

Q. And was that information relayed to you?

A. I believe it was.

Q. The next line down at 14:34:30, there is an indication that appears to read "No weapon." Is that correct?

A. Yes.

Q. And was that information relayed to you?

A. I believe it was.

Q. Did you at any time receive any affirmative information to contradict that report?

A. I'm sorry, repeat your question.

Q. Did you at any time receive any affirmative information to contradict that report?

[72] A. In regards to no weapon?

Q. Yes, sir.

A. No.

Q. Okay. Immediately underneath that at time index 14:34:34 it says "Verbal." Do you know what that means?

A. Usually when the dispatcher or the call-taker puts that on a call screen, it means at that particular time when they're speaking with the reporting party that the situation they are involved in, the reporting party, is a verbal confrontation, disagreement, verbal confrontation. That's not to say that that verbal confrontation cannot escalate into physical confrontation later on. But at that point in time and probably prior to them speaking to the call-taker, it's a verbal confrontation.

Q. Then if you take a look down, and I think it's at 14:36:11.

A. Yes.

Q. It says "No INJ." Does that mean no injury?

A. Yes.

Q. Again, [illegible] that communicated to you?

A. Yes.

Q. And what does that mean?

[73] A. It means at that point in time neither party is reporting an injury.

Q. At 14:36:51 there is an entry which reads "Kids now running away from apartment. Containers and furniture being thrown out of the apartment." Did you receive that communication?

A. I believe so.

Q. When you got to the scene, it's my understanding you spoke to a reporting party who had also indicated the kids had left the apartment, is that correct?

A. That was—it was not a conversation. It was more of an answer/question. And that was several yards away. At one point in time it was clarified that some children had left the apartment.

Q. Let me back up. You were told at 14:36:51 by dispatch that kids are running away from the apartment, correct?

A. According to this document, yes.

Q. Okay. And you recall that, right?

A. Yes.

Q. Alt right. And then when you arrive on the scene you have a question and answer where someone said kids are running from the apartment, right?

[74] A. Something similar to that, yes.

Q. Do you remember the exact words?

A. No, I don't.

Q. Okay. And then during your conversation with Mr. Herring, he had indicated something to the effect he told the kids to leave, right?

A. Yes.

Q. So you had from three separate sources the kids had left, correct?

A. Yes.

Q. Okay. Time index 14:41:15, "Suspect, Greg; is now nude, in Greg's apartment."

A. Okay. What time is this?

Q. 14:41:15.

A. Okay.

Q. Was that information conveyed to you?

A. Yes, I believe it was.

Q. At 14:41:58, "Suspect is in his own apartment now, tearing up apartment." Was that conveyed to you?

A. Yes.

(Brief interruption in proceedings.)

Q. (By Mr. Frank) If we can go down to time index 14:49:05, it says, "Kids ran from scene." Was that reported to you?

[75] A. Yes.

Q. And that was in addition to the prior report that you received at 14:36:51 about the kids?

A. Yes.

Q. And that's distinct from the question and answer with the reporting party?

A. Yes.

Q. And that's distinct from the conversation you had with Mr. Herring?

A. Yes.

Q. Okay. At time index 14:49:43 it says, "In east bedroom talking to officer through window." You would agree that that's most likely you, right?

A. Yes. I would also like to indicate that your records and my copy here, the time is slightly off. You said 14:49:43?

Q. The talking through the window?

A. In east room talking to officer through window.

Q. 14:49:43.

A. I have 14:49:45.

Q. What is the Bates stamp number on the right side of the page?

A. PL00366.

Q. Okay. And that looks like a 5 to you?

[76] A. Well, it is a 5.

Q. It's much clearer on yours than it is on mine. Okay. You're correct.

A. Thank you.

Q. And thank you for that clarification. So it's clear that you arrived prior to 14:49:45, is that correct?

A. Correct.

Q. And would you have made the report to dispatch that you were talking to Mr. Herring through the window?

A. Yes, I did.

Q. If you go back up to 14:49:16, "Inside house, acting very bizarre." Do you see that 5 remark?

A. Yes.

Q. Would that have been something that you reported?

A. Yes.

Q. Would it be fair to say that from this time index forward, to the extent that there were descriptions or remarks as to what occurred, those would have been things that you would have either personally observed or, in the alternative, have reported as opposed to just hearing from radio [77] dispatch?

A. Yes.

Q. If you can take a look at PL00368.

A. Okay.

Q. If you'll look at time index 14:35:32.

A. Yes.

Q. Under unit, when it says 4A61, you guys refer to that as 4-Adam-61, right?

A. Yes,

Q. Do you recall whether you were 4-Adam-61, 4-Adam-05, or 4-Adam-64?

A. I was 4-Adam-61, because right off to the right of that it says PSN, and that would refer to my IBM number as 88. So I was 4-Adam-61 on that date and time.

Q. May I lean over, Officer, and you can show me where it says PSN, because I can't find it on here. Got it. Thank you.

If one looks at the time at which you were dispatched, which would be 14:36:12, to the time where it says 4-Adam-64 arrived, 14:49:37, it looks like it took you about 12, 13 minutes to get there?

A. Yeah. Did you say I was dispatched at 14:36 or 14:35?

[78] Q. 14:35. Thank you.

A. 14:3532. 4-Adam-61 was dispatched status DSPH, dispatch.

Q. And then you actually—when did you 5 arrive?

A. According to this record that you provided, I arrived at approximately 14:46:58.

Q. And just so the record, is clear, the CSPD provided this to me. Pm not providing this.

A. No, but you gave it to me.

Q. Got it. So it took you about 10 minutes to get there?

A. Yes.

Q. Can you describe to me your arrival, the things you observed and the things that you did?

A. Just specifically arrival?

Q. Yes, sir.

A. Okay. When I arrived at the entrance of the apartment complex where Mr. Herring was residing at the time, Engine 17 from Colorado Springs Fire Department Station 17 arrived at approximately the a same time. I believe they were called in regards to the medical portion of this call, because it did indicate from the reporting party, and as we see on this dispatch log, that Mr. Herring, or the [79] individual prior to knowing he was Mr. Herring, was injured.

I spoke to the fire department personnel to see or to find out where they were going to, what address they were dispatched to, because as I said earlier, and I believe you asked the question, there was another call that came in that was similar to the circumstances I was responding to, and that was a different address, but it was in the same complex.

So after speaking to them for a very brief period of time, probably less than 20 seconds, myself and the firemen responded over to Mr. Herring's apartment.

Q. Is your answer complete?

A. At that point in time, yeah, we all responded to his apartment.

Q. Before you got to his apartment, that's when you had the question and answer with the reporting party, is that correct?

A. For the most part, yes.

Q. Okay. And he was actually in a second-story window talking to you?

A. Yes.

Q. And can you relate to me to the best of what you can recall what was said?

[80] A. I believe he was pointing toward Mr. Herring's apartment and was indicating to me—again, I can't verbatim, if it's even a word, you know, give you

the exact conversation. But the conversation, the question and answer between myself and this individual, was that the apartment was on the first floor in another building, not his. And he was pointing in the general direction. And I believe I asked him if that's where the disturbance was taking place. I said yes. Then he had mentioned something about children and stated that children had left the apartment.

Q. And in your videotape, and we can play it for you if you would like me to because I have the time index down, it indicates that the reporting party actually said to you, hey, you know, keep a lookout for the kids, and you asked where the kids are, and he said they had already left. Do you recall that, Officer, as we sit here right now?

A. Yes.

Q. And that's about what occurred; right?

A. Yes.

Q. Okay. When you arrived at the apartment complex, it's fair to say that based upon the -reports that you had received, both the initial [81] dispatch and the updates, that you were dealing with somebody who was exhibiting bizarre behavior, is that correct?

A. Yes.

Q. What behavior was he exhibiting that to you constituted bizarre behavior?

A. A number of factors were in play here; one, that lie was throwing things out of his apartment, that windows in his apartment were completely broken out, that he was running around the apartment complex naked, that he had injured himself or he had received injuries to himself in some fashion, that the person calling the police department was concerned that there was a naked individual outside

his door banging on his door, and that there was this general disturbance going on regarding Mr. Herring.

Q. In the tape at different points you use the terms "bizarre behavior," "abnormal behavior," and "totally out of the ordinary behavior." To you, do those all mean the same thing?

A. Yes.

Q. And do those accurately describe what you understood to be the situation as you were responding?

[82] A. As I saw it.

Q. Did you at that time form any assessment or opinion as to whether the person you were contacting may have been suffering a mental health problem?

A. No.

Q. Based on the training that you have received since then through the CIT program, was the behavior that was exhibited by Mr. Herring indicative of a mental health problem?

A. No.

Q. And why was it not indicative of a mental health problem?

A. Because I was not speaking to Mr. Herring or an individual involved to find out if they were suffering from some type of mental health problem, they were diagnosed with some type of mental health problem, or if they were on medication for the treatment of a mental health problem.

I had a situation that there was an individual, as I stated earlier, that was running around his apartment complex naked, bleeding, and throwing items out of his apartment. And when I looked inside his apartment, it looked like a bomb had gone off. That is not indicative to me of [83] someone suffering mental illness.

Q. All right. So all of the behaviors that we have just described, the running naked, the busting out

windows, all the other bizarre behaviors, none of those to you, based on the training you received prior to May of 2003 or even subsequent to May of 2003, are indicative of a mental health problem?

A. Correct.

Q. Thank you. He was also making bizarre statements, wasn't he?

A. Yes.

Q. All right. Were any of those statements indicative of a mental health problem?

A. No.

Q. Is it fair to say that when you responded to this situation, you did not assess this as a situation involving a mental health issue?

A. Correct.

Q, And at no time during this situation did you treat it as a response to the mentally ill?

A. Specifically as a—him suffering from mental illness?

Q. Yes, specifically him suffering from mental illness.

[84] A. Yes.

Q. Did you ever describe Mr. Herring as suffering a complete mental breakdown?

A. I can't recall.

Q. What does a complete mental breakdown suggest to you if you were to hear that term?

A. In my layman's terms, it would mean that somebody is not able to carry on with day-to-day functions, taking care of themselves, dressing, cleaning, maybe somebody who is very emotionally upset, crying, acting hysterical.

Q. Would it suggest to you that someone was suffering from a mental illness?

A. It could.

Q. What else would it mean to you?

A. I think my answer in that regards is probably complete.

Q. Okay. That's fine. So what it would mean to you if you made the statement he was having a complete mental breakdown, if you made that statement, that would suggest to you that the person is suffering an acute mental illness?

MR. WHITE: Objection; mischaracterizes his statement.

Q. (By Mr, Frank) Then I don't want to [85] mischaracterize anything. Please tell me what the statement "He was having a complete mental breakdown" would mean to you and would it be indicative of a mental illness.

A. Are you stating or asking me when I would use the term "mental illness" or when somebody would tell me—or, excuse me, when I would use the term "mental breakdown" or somebody telling me about somebody else having a complete mental breakdown?

Q. If you were describing this incident relating to Mr. Herring and if you told somebody that in your opinion Mr. Herring was having a complete mental breakdown, I'm trying to find out what you mean by that, Officer, because when I hear that, I think of a mental health problem. But you're telling me you didn't think there was a mental health problem involved here. So I'm trying to figure out what you meant by that statement.

A. Did I make that statement?

Q. Yeah, you made that statement.

A. When did I make that statement?

Q. You made that statement in your tape. And if you would like to see it, we can rewind it and I'll let you see it.

A. I don't recall making the statement.

[86] Q. Would you like to see the statement and refresh your recollection?

A. Yes, I would.

Q. And if at any time, Officer, you want to see a document, you've just got to tell me and we'll show you the document. Okay?

A. Fine.

Q. Officer, how many times have you testified in court?

A. That's hard for me to give you a -specific number. Hundreds.

Q. I know that this picture has lines through it because I'm fast-forwarding it. Do you recognize yourself in this picture?

A. Yes.

Q. And does this appear to be a tape of your interview that we discussed earlier?

A. Yes.

Q. What I'm going to do, Officer, is, I'm going to start this at tape index 7:49:54, just for convenience sake, and if you need me to go back further, you just let me know and we'll go back further.

A. Sure.

(Whereupon, a portion of the videotape [87] was played.)

Q. (By Mr. Frank) Did you state that you thought he was having a mental breakdown or was on drugs or something?

A. Yes, I did state that, according to the video.

Q. And for the record, we ended at time index seven 7:50:46.

And, Officer, what did you mean by that statement? I don't want to put words in your mouth. I just want to know what you meant by that statement.

A. After reviewing that section of the tape and the best of my recollection, I didn't know what this individual was suffering from or what he was on, so I used those terms in regards to describing what I kind of thought was going on. He either was having a mental breakdown or he was on drugs because of his behavior, due to him being naked, due to him having injuries on himself, due to his apartment I being totally destroyed as if a bomb went off in it, and every window on the apartment being broken out, as well as him running around the apartment complex naked.

Q. So it's fair to Say that at least as of [88] the date that you gave this interview, you recognized that this may have been an issue that implicated the mentally ill?

A. Or he was on drugs.

Q. Okay. Or the mentally ill?

A. Or he was on drugs.

Q. So both, right, Detective?

A. Yes.

Q. Excuse me. I just promoted you, Officer.

A. I was a detective at one time.

Q. Would you prefer I use that title as opposed to officer?

A. No, officer is fine.

Q. Now, it's fair to say that you were pretty sure that the kids were not in the apartment and you were only dealing with Mr. Herring, correct?

A. No.

Q. Did you ever make such a statement?

A. Repeat your question.

Q. Sure. My specific question was, had you ever made the statement that you were fairly sure that the kids were not in the apartment and that you were only dealing with Mr. Herring?

A. Can I see the tape?

[89] Q. Sure. And well begin the tape at time index 7:51:59.

(Whereupon, a portion of the videotape was played.)

Q. (By Mr. Frank) And we stopped at time index 7:52:16. Did you make those statements, Officer?

A. Yes.

Q. And those statements were that at that time you were fairly sure the kids were not in the apartment, correct?

A. Yes.

Q. We have gone through your arrival. What did you do after you arrived?

A. In portions of it, yes, not completely. I don't understand what you're saying.

Q. It was a poorly asked question and I apologize. I'm not trying to trap you up anywhere. You and I have discussed your arrival, you saw the fire department, you had a brief question and answer with the reporting party. Correct?

A. Yes.

Q. What did you do then?

A. I approached his apartment.

Q. Okay. Describe that to me.

[90] A. His apartment building runs, I believe, north and south on the property. His apartment was on the first floor. The main entrance to the apartment was on the northwest corner of that building.

The first window I came to was on the west side. And I looked into that window, which was completely broken out, glass on the outside on the ground, glass on the inside of the room, and there were items, toys, household items on the ground outside the window, and the room was completely destroyed, it was in

disarray, it was like a bomb went off in there. There was blood, I believe, on the wall. Or there was some blood on the wall. Not in one specific area, but in different areas.

Q. Is your answer complete?

A. No.

Q. Okay. Go ahead.

A. I believe I called into that room hoping that somebody would respond. Nobody answered. I believe I heard some moaning or some type of grunting or sounds coming from inside the apartment. Looking inside that window, there was nobody in that room. There could have been somebody injured inside that apartment with what I saw. There could have [91] been one person. There could have been other people in there. I did not know who was inside or how many people were inside.

Q. Did you see at any point any more than one person inside that apartment?

A. No.

Q. Thank you.

A. I walked around the wall. I checked the door. It was closed and I believe it was locked. I walked around that corner on the north side of the apartment. I believe there was another window that was broken out, glass on the ground, glass on the floor inside. That room or area of the apartment was Completely destroyed. Items outside the window, items on the floor.

I continued to walk around the building to the east side and there was one window on the east side that was completely broken out. I believe I heard some noise coming from inside that window. I walked along the wall.

Q. When you say "walked along the wall," how close were you to the wall?

A. Couple inches or so.

Q. Thank you.

A. And I came to that window and there was [92] the individual. He was a black man, naked, bleeding from a cut on his arm, cut on his stomach, putting a blanket or comforter on that broken window and leaning on that windowsill balancing himself on that windowsill.

I introduced myself and I asked him who he was. Got no response.

Q. Okay. At the time that this was occurring, bow far were you from the window?

A. Inches. A foot.

Q. Okay. At any time did you back away from the window?

A. The farthest distance might have been four feet, maybe five feet.

Q. If someone had reported that you were 25 yards from the window, would that be an accurate report?

A. That was their observation, that's what they saw. I was only four to five feet away from that window.

Q. That doesn't answer my question. If somebody said you were 25 yards away from that window, would that be accurate?

A. No.

Q. You indicated that you introduced [93] yourself. What happened then?

A. I looked around the room. It appeared to be a bedroom. I mean, a lot of things are going on simultaneously now. So it's not just so clear-cut black and white. A lot of things are happening. I'm looking

around the room. It appeared to be a bedroom. The bedroom was completely destroyed, numerous items on the floor. 'Okay? Again, I use the term "looked like a bomb went off inside the house or that particular room."

There was this individual, who was later identified as Greg Herring, naked, had injuries to his body. Whether he did it himself, somebody else did it, okay, or it occurred when the apartment was destroyed, I don't know.

Q. You had received no report that he had been attacked, is that correct?

A. Correct

Q. Okay. Thank you. Go ahead.

A. You got to take these things into consideration. You're only getting one side of a story when you're a dispatch. You're only getting one side of the story when you're speaking to somebody. There's either two pasts, three parts, depending on how many people are involved. You're [94] only getting part of the information when you're dispatched and you're speaking to somebody. A lot of different things and factors are taken into consideration when you are dealing in situations like this.

So I believe I said I looked around the room real quick. That was destroyed. Mr. Herring was naked. He had injuries to himself. He was leaning outside that window balancing himself on that windowsill. I attempted to have a conversation with him in a calm, clear manner. I wasn't yelling at him. I wasn't screaming at him.

Q. Can you relate that conversation to me?

A. I can't verbatim.

Q. Give me as much detail as you can.

A. "I'm Officer Darress. Who are you?" I got no response. "I'm here to help you." I believe he kind of mumbled or muttered something about war, something about you being the police, you're here maybe to hurt me. I asked him possibly what was going on. I couldn't figure out what was going on.

I was there maybe about a minute or so when the other two officers arrived on scene. And they stayed back at the corner.

Q. This entire conversation that you have [95] just relayed to me, did that conversation occur before the other officers arrived?

A. Yes.

Q. Okay. So the entirety of what you just related occurred in a one-minute period of time?

A. Or so.

Q. Okay. At that point it's my understanding he was still throwing things out the window, right?

A. Yes.

Q. But he wasn't throwing them at you?

A. Yes.

Q. And by that, that's a correct statement?

A. I believe I mentioned that, yes.

Q. Okay. Its just the way I asked it, Officer, it was poorly worded and I want to make sure for the record it's clear that he was not throwing things at you.

A. Right. I believe you're reading transcripts based of that video and you're using statements that I made that I might not be able to recall, so—

Q. That video was made how long after this incident?

A. Couple hours.

[96] Q. So at the time that you made that video I everything was real fresh in your mind, right?

A. Yes.

Q. And to the extent your memory is in any way incomplete now, it was fairly complete back then?

A. Yes.

Q. And to the extent that your recollection now differs slightly from what's reflected in the videotape, the videotape would probably be more l accurate?

A. Yes. And it's two years since the incident.

Q. What happened when the other officers showed up?

A: I was continuing to talk to or attempt to talk to or have a conversation with Mr. Herring to find out what happened, why he was acting this way, what happened, you know, inside the apartment, if there was anybody else inside the apartment.

I mentioned, I believe, that the kids had left. I didn't know if anybody else was in I there. Nobody else had mentioned that. But there's always the possibility of somebody else being in I there.

[97] Q. And Mr. Herring told you that the children had left, correct?

A. Yes.

Q. Did you have any affirmative information that anyone else was present in the apartment?

A. No.

Q. Okay. Then what happened?

A. Having that situation in front of me, seeing that with the different factors that I had mentioned, his behavior, his injuries, the damage to the apartment, the windows being broken out, not having the affirmative information that somebody was in the apartment, but maybe somebody else could have been in the apartment, the other two officers were at the corner, I think, by the front door, I thought it was necessary—I determined that it was necessary to keep Mr. Herring in that room, to not let

him out of my view into a room that nobody had view of so he wouldn't continue to hurt himself or arm himself with a weapon, okay, or cause injury to somebody that might have been in there that we did not know of and wanted to keep him in that bedroom.

Q. Did this constitute a barricaded subject or suspect scenario?

A. No, not that I could recall.

[98] Q. So this incident, as you saw it, was not a barricaded suspect scenario?

A. I needed to provide help to an injured man.

Q. That wasn't my question. My question was, did you consider this to be a barricaded suspect scenario?

A. No.

Q. Okay. Go ahead. I interrupted you.

A. I needed to provide help to an injured man. Something happened in his apartment. I directed the—that's bothering me.

Q. Okay. So when they walked around the other side of the apartment, what happened then?

A. I believe they attempted to open up the front door. It was locked.. They came back. They indicated to me, either saying it or kind, of doing hand signals, that the front door was locked. I then indicated to them, either mouthing it or some type of hand gesture, to kick open the front door.

Q. And how far away from the window were you when this conversation took place?

A. Within a foot, two feet.

Q. You weren't 25 yards away?

A. No.

[99] Q. So any statement that you were 25 yards away would be incorrect?

A. Correct.

Q. Then what happened?

A. I was continuing to talk to Mr. Herring, hoping that he would still focus on me, not hear the officers enter the apartment. There was a noise. He did, I believe, hear the noise, because he did look away from me, he was distracted, looked toward the door of the bedroom. And then within, you know, a matter of seconds Officer Carroll and Officer Ambuehl were in that hallway by the bedroom door.

Q. How much time passed from when you first began speaking with Mr. Herring to the time that the other officers forcibly entered his apartment?

A. Five—less than five minutes.

Q. Did you at any time call a supervisor?

A. No, I don't recall calling a supervisor.

Q. What happened after they forcibly entered his apartment?

A. I was continuing to talk to him, to have a dialogue with him. I wasn't having a conversation with him as you and I are having now.

Q. What were you saying to him and what was he saying to you?

[100] He was still kind of mumbling, I think, some type of religious overtones. He—I think he had mentioned something about war, that, you know, people—or I was here to hurt him, stuff like that. They were at the door. He focused on them, on Officer Carroll and Officer Ambuehl, and he walked toward them, he charged them. And that's -when I believe Officer Carroll sprayed him in the face with mace.

I also believe, if I can recall correctly, that prior to —and upon reviewing the videotape, I do believe I mentioned in the videotape that before they either got there or they were inside the apartment he took his hands and wiped it on that cut on the abdomen and then took his hands with blood on it and sin eared it on his face.

Q. Do you specifically recall that now or do you just recall it from the video?

A. Both.

Q. Okay. Then what happened?

A. After Officer Carroll sprayed him with a real quick burst of OC, he turned away from them; took both of his hands, gestured, and put them on his face like he was wiping the OC away, and then Charged them and there was a physical fight that [101] occurred.

Q. Okay. After he charged them, what occurred?

A. I thought to myself, well, I could probably jump through the window and get to the officers quickly, but then I realized that I probably would injure myself doing that. He had that blanket earlier, and the thought went through my mind that since he was naked, since he did have body fluid on him, since he did have cuts on himself, it's very hard, from what I understand, to try to control an individual who is naked, who is sweating, there's nothing to grab onto such as 'clothing, it's hard to grab onto, you know, a wet body; so I was thinking, well, I could grab a blanket, if not the one he had, to by to wrap it around him so the physical altercation could end quickly and we could get him the medical help that he needed.

I ran around the apartment. I went in through the front door. I looked for a blanket or some type of item on the floor. I believe I found a blanket. I ran to the bathroom.

Q. Did you have to go past the bathroom to find a blanket and then come back or on the way from [102] the front door to the bathroom you found yourself a blanket?

A. On the way to that bathroom I found the blanket. I did not deviate from going directly to that bathroom.

Q. Okay. And what did you see when you got to the bathroom?

A. I believe Officer Ambuehl could have been standing up and. Officer Carroll and Mr. Herring were involved in some type of physical confrontation. They were either standing up or on the ground. Officer Ambuehl was there, I believe, tying to help Officer Carroll.

Q. Let me stop you and back you up, because I want to make sure I understand what your recollection is. Do you specifically recall one way or another whether at that point Mr. Herring was standing or on the ground?

A. I don't specifically recall.

Q. Okay. And do you recall specifically Officer Carroll's position in relation to Mr. Herring?

A. No, not right away.

Q. Do you specifically recall Officer Ambuehl's position as it relates to Mr. Herring?

[103] A. No.

Q. Okay. Then what happened?

A. There is this fight going on. And I attempted with this blanket to wrap it around Mr. Herring.

Q. When you attempted to wrap the blanket around Mr. Herring, was he standing or was he on the ground?

A. I really can't recall. He was either standing or on the ground, but I believed when I had this blanket there was an opportunity that I thought to wrap this blanket around him to control him.

Q. But what I'm trying to do in all these questions, Officer, is identify Mr. Herring's body position vis-a-vis the positions of the officers. And as you sit here today, you can't recall whether he was standing up or on the ground when you attempted to wrap him with the blanket, correct?

A. Correct.

Q. And it's also fair to say that you don't recall the positions of the other officers vis-à-vis Mr. Herring when you attempted to wrap him with the blanket, correct?

A. Correct.

Q. Okay, At some point do you recall Mr. [104] Herring being on the ground?

A. Yes.

Q. Okay. At what point do you recall him being on the ground?

A. That was probably after I attempted to wrap him with the blanket. Because when he was on the ground, the blanket was not around him. I did not have it in my hands. And I believe it was forced away or off of him by Mr. Herring into another part of his bathroom that we were all now in.

Q. Do you specifically recall him going to the ground?

A. No.

Q. So as a corollary to that, you don't know whether he was thrown down, tackled down, fell down, you don't know how he got down onto the floor, right?

A. Correct.

Q. Okay. How long after you entered and entered the bathroom area was he on the ground?

A. A second, quickly.

Q. So whether or not he was standing at the time you got there, shortly after you got there you know that he was on the ground?

[105] A. Yes.

Q. All right. When he was on the ground, was a portion of his body outside of the bathroom?

A. I can't answer that.

Q. Okay. When he was on the ground, was he face up or face down?

A. Face down.

Q. Was he face down the entire time?

A. Yes.

Q. Where were you in relation to Mr. Herring when you first remember him being face down on the ground?

A. I was on his back.

Q. Okay. Left side, right side?

A. Right side.

Q. And by that you mean Mr. Herring's right side as he was laying down, face down?

A. On his right side as he is on his stomach, on his right side.

Q. Thank you. Where was Officer Ambuehl at that point?

A. I believe he was behind myself and Officer Carroll.

Q. Do you recall whether Officer Ambuehl was holding any part of Mr. Herring?

[106] A. I do not, because I did not see Officer Ambuehl after I was on Mr. Herring's back.

Q. Okay. Do you know where Officer Carroll was?

A. To my left side.

Q. And could you see Officer Carroll or any action taken by Officer Carroll?

A. Yes.

Q. Okay. Where was he in relation to Mr. Herring's body?

A. He was on his right side—or left side. Excuse me.

Q. So if I understand, you were on Mr. Herring's right side up around his shoulders and back?

A. Yes.

Q. Officer Carroll was on his left side a little bit down from you, more toward his waist?

A. All I know is he was directly to my left.

Q. Was he—

A. I saw him. He was parallel to me.

Q. All right. So he would have been up around the shoulders as well?

A. Yes.

Q. Okay. And then Officer Ambuehl was back there someplace, but you didn't see him because you were busy taking care of what you were taking care of?

A. Correct.

Q. Okay. What happens when you're at that point?

A. Trying to control Mr. Herring. I believe—I'm saying to him, if not Officer Carroll, "Calm down." I took out my handcuffs. I believe Officer Carroll had his right arm—or, excuse me, his left arm his control. I gave Officer Carroll my handcuffs so he could handcuff the left arm. I tried to grab for Mr. Herring's right arm. I wasn't able to grab onto it because he was resisting us. He was fighting us. He was slippery.

Officer Carroll got that left handcuff on his left arm. I was not able to get it on the on his right arm. And then I believe Mr. Herring 1 bites Officer Carroll on the web of his left hand. And I saw that, I saw Mr. Herring's teeth on Officer Carroll's hand.

Q. Had either your position or Officer Carroll's position in relation to Mr. Herring's body [108] changed during that period of time substantially?

A. No.

Q. Okay. It's my understanding from reading the reports and listening to the tape that you were

grabbed in the groin. Did that occur before or after Officer Carroll was bitten, do you recall?

A. I would have to refer to the tape, but it was somewhere around the same time as Officer Carroll got bit, Mr. Herring grabbed my groin with his right hand and was causing pain to me.

Q. And what did you do at that point?

A. I believe after reviewing the tape yesterday, I took my left hand, clenched it in a fist, and I didn't want to hit Mr. Herring in the head with my knuckles, so I hit Mr. Herring in the head with the fleshy part of my left hand about five or six times to release his grip on my groin.

Q. And in the tape you use the term that you were slamming it down like a hammer. What does that mean?

A. I was slamming it in a downward fashion.

Q. Do you recall using the term "slamming it down like a hammer"?

A. Yes. And I believe also investigator [109] Linda Dix from the DA's office used the same term.

Q. And that was approximately five or six times?

A. Yes.

Q. And at that point Officer Carroll also hit him with a fist as well, correct?

A. I believe so.

Q. A couple of times?

A. You would have to refer to his statement.

Q. At what point did you utilize your PR-24 to strike Mr. Herring?

A. After he grabbed the PR-24 out of my holder and I believe he was biting my knee, my right knee.

Q. And where did you strike him with the PR-24?

A. In his head.

Q. And how many times?

A. Four or five times.

Q. And, again, I think you indicated that was a flat chop, is what you called it?

A. Yes.

Q. And he did not respond to that?

A. Correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

Scheduling Attorney for the Plaintiffs:

MR. ROBERT J. FRANK, ESQ.
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& Associates, LLC
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DEPOSITION OF RORY CARROLL
September 21, 2005

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[22] to call a supervisor versus go ahead and enter?

A. Okay. That is if we determine or believe, have reason to believe that there is somebody inside the home that is injured, and if they don't get immediate medical attention, could die: Somebody that is actively trying to harm themselves. If there is actually shooting, if we hear shooting or if we hear somebody physically being beaten or hurt, that is when we are going to go in.

Q. What are the advantages or disadvantages of waiting until an officer in a supervisor capacity arrives?

A. If we can wait, it means that at that point everything is calmed down and nobody is being hurt; we know that everybody is okay. Plus we have the backing of our officer to help us make the decisions. Basically time is on our hands at that point.

Q. When you are making a consideration as to whether time is on your side, is one of the things you consider the level of communication you are receiving with the barricaded suspect?

A. Yes.

Q. And would it be fair to say, Officer, that if the barricaded suspect is talking to them, that is at least one factor that mitigates against immediate response in favor of having supervisory personnel respond?

A. It depends on what they are doing as they are [23] talking to us. If they are talking to us waving a gun or a hostage. Every situation is different.

Q. Would it be fair to say that oftentimes in a barricaded situation, you can't see the suspect?

A. Correct.

Q. And that even in those situations where you can't see the suspect, if you believe time is on your side, you wait for a supervisor, correct?

A. Yes.

Q. This is one of those times when you have to let me finish.

A. Sorry.

Q. That's okay. I will do that from time to time. I am not chastising you. I am trying to keep the record clean.

A. That's fine. Remind me..

Q. I certainly will. Again, what the standard is that you use in making the determination is really based upon the knowledge that you have on the scene, whether you have sufficient reason based upon what you actually know to believe that you need to enter early, correct?

A. Yes.

Q. And that decision isn't made on could be's; that decision is made based upon the knowledge that you have, right?

[24] A. Not always.

Q. When is it appropriate to make a determination on could be's versus knowledge that you actually have?

A. Life threatening. Any time we can—we reasonably believe somebody's life is in immediate danger.

Q. Let's take the example of a barricaded suspect that you can't see, okay, who is talking to an officer. You would agree, sir, unless you have something more, some information that there might be something life threatening, in that situation you would wait for a supervisor?

A. Yes.

Q. Is there any other circumstance, other, than the ones that you have identified for me, where you would wait for a supervisor or other administrative personnel?

A. Not that I can think of.

Q. Are there times as a law enforcement officer when you request medical assistance?

A. Yes.

Q. Now, do you as the officer do that, or does dispatch do that? How does that work?

A. We request it from dispatch, and dispatch requests it. The dispatch, actually the fire dispatch and AMR dispatch all sit up in the same roam.

Q. Under what circumstances will you request medical assistance?

[25] A. If an officer is injured, if a witness or reporting party is injured, if the suspect is injured, or if anybody requests it.

Q. And by anyone, do you mean anybody present on the scene?

A. Yes.

Q. Does the Colorado Springs Police Department have a designated mental health officer or liaison?

A. Not that I know of

Q. Have you contacted the mentally ill during your tenure as a CSPD officer?

A. Yes.

Q. On how many occasions?

A. I couldn't give you a number.

Q. That is one of those areas where I don't want you guessing. Can you give me a ballpark approximation?

A. In the five years, over 100.

Q. Would you agree, sir, that it is not an unusual thing for an officer to be a first responder as it relates to a mental health crisis?

A. Yes.

Q. Would you agree that Colorado statute allows police officers to make initial assessments and transport an individual to a hospital or other mental health care facilities if in the officer's judgment the person needs [26] that?

A. Yes.

Q. This may be one of those areas where it is too far off that you just have to guess, but can you tell me what percent of your emergency calls in some way deal with the mentally ill?

A. 15.

MR. WHITE: If 1 can get some clarification on that last question. Are you talking about his personal emergency calls, or are you talking about emergency calls that come in at CSPD total?

BY MR. FRANK:

Q. Thank you. Officer, 1 was referring specifically to your calls, not—

A. That is what I thought you said.

Q. So, when you are saying 15 percent, that is an estimation of 15 percent of your calls?

A. Estimation. I couldn't give you an, exact number.

Q. Thank you. I appreciate that clarification. Would you agree that contact with persons with mental illness is a foreseeable part of your job?

A. Yes.

Q. Of that 15 percent contact with the mentally ill, can you give me an indication as to what percentage of that may require an officer to use some level of physical force? 27] And by that I mean, beyond just giving commands?

A. You are talking about my response?

Q. I am talking about your response.

A. Out of 15 percent, maybe one or two.

Q. This is a question where I anticipate that Mr. White will object, but I have to ask it for the record anyway. Have you ever been subject to any disciplinary action for anything within the CSPD?

MR. WHITE: You are correct. I am objecting and instructing you not to answer.

BY MR. FRANK:

Q. Have you ever been subject to any disciplinary action as it relates to contact with the disabled?

MR. WHITE: Same objection. Don't answer.

BY MR. FRANK:

Q. Have you ever been subject to any disciplinary action as it relates to contact with the mentally iII?

MR. WHITE: Same objection.

BY MR. FRANK:

Q. Have you ever been subject to any disciplinary action relating to interaction with a racial minority?

MR. WHITE: Same objection.

BY MR. FRANK:

Q. When you reviewed the interrogatory answers in preparation for this deposition, did you make any notes or [28] other memorandum?

A. No.

Q. Do you have any personal notes relating to the Herring matter?

A. No.

Q. What are your personal habits and procedures as it relates to making and retaining notes of calls?

A. If I file a report, I write notes on a standard notebook paper. Once the report is done, sent through an(accepted, I throw the notes away.

Q. Is there a reason why you do that, Officer?

A. It is just a habit.

Q. Is there, to your knowledge, a specific CSPD policy in that regard?

A. No.

Q. I don't know whether this question is objectionable or not. Have you ever been subject to any discipline in your career as a member of the United States Navy?

A. No.

Q. What rank were you when you got out?

A. E-3. I was a damage control man.

Q. Did you receive training relating to contact with the mentally ill as a Colorado Springs—or as part of your training with the Colorado Springs Police Department?

[29] A. Yes.

Q. I would like to break this next series of questions up into three separate areas. The first will be the 18-week training program, and I understand that to be your initial CSPD training; is that correct?

A. Yes.

Q. And then you have, I believe it is a three-and-a-half-week in-service training program; is that correct?

A. What do you mean?

Q. Let me go back and make sure that I understand. You have—I'm sorry. A three-and-a-half-month field training program?

A. Yes.

Q. Then in addition to that, you have daily briefings; is that correct?

A. Yes.

Q. Do you sometimes view training videos during these daily briefings?

A. Yes.

Q. Do you have any other periodic training programs that are made available to you?

A. Yes.

Q. What other periodic training programs are made, available?

[30] A. We do in-service training every year, which consists of an entire day of training. It is usually two to three times a year, depends on the training academy's schedule, but it is always at least once a year. Then we are also required by policy to obtain a minimum of ten hours of elective training.

Q. Is your answer complete?

A. Yes.

Q. So, I have an 18-week training program, a 3.5-month field training program, daily briefings, in-service training, which is a day-long training, which is two or three times per year, and a minimum of ten hours elective training; is that correct?

A. Yes.

Q. Officer, do you belong to any professional police organizations?

A. The Police Protective Association.

Q. Do you receive any training through the Police Protective Association?

A. No.

Q. Do you subscribe to any law enforcement-related periodicals?

A. No.

Q. Who was responsible for your training?

A. I don't understand.

[31] Q. Okay. We agreed you would tell me that. And I think I know where the question went wrong. Who was responsible for your daily briefings?

A. Our supervisors.

Q. Who is your current supervisor?

A. It is now Sergeant Ron Shepard.

Q. And when did Sergeant Shepard take over as your supervisor?

A. About a month ago.

Q. And who was it before Sergeant Shepard?

A. Sergeant Angelo Buterries.

Q. Can you spell that?

A. I wish I could.

Q. And how long was Sergeant Buterries your .supervisor?

A. Since the beginning—since December 20th of last year.

Q. That would be 2004?

A. Yes.

Q. And who was it before Sergeant Buterries?

A. It was Sergeant Schiavi.

Q. Any spelling on that?

A. S-c-h-i-a-v-i.

Q. And when was Sergeant Schiavi your supervisor? A. The entire year of 2004.

[32] Q. Before Sergeant Schiavi?

A. It was Sergeant Rissler.

Q. And how long was Sergeant Rissler your—

A. The entire year of 2003.

Q. Do you know how to spell that?

A. R-i-s-s-l-e-r. That is a guess.

Q. Describe to me all training you received as it relates to contacting either persons with special needs, special populations, or with the mentally ill during your 18-week training program.

A. I don't think I will be able to describe all of it. That was about five years ago. I don't remember every little detail about it.

Q. Okay. Let me back up. Did you receive training regarding contact with the mentally ill during your 18-weel training Program?

A. Yes.

Q. Did you receive training relating to contact with special populations during your 18-week training program?

A. Yes.

Q. Did you assist in gathering the training ma terials that were attached to your interrogatory responses?

A. No.

Q. Do you keep copies of the training materials you received during your 18-week training program?

[33] A. No.

Q. Tell me everything you can remember, understanding that it was five years ago, regarding training you received as it relates to contact with the mentally ill.

A. Okay. I remember a day long of training, a full day. We discussed how to recognize as much as we can on the street mental illness. What kind of questions to ask, what kind of medical attention is needed, if and when. Policies and state law regarding mental illness.

We also did some scenario training where we would actually—training officers would play mentally ill people, or they will set up a scenario, and the recruits have to work through it, come up with solutions. And they did everything. We went to like three or four scenarios. One where it was a guy talking to himself on the street, and one where the guy was violent and he was in a red suit.

Q. Tell me about the scenario where the guy was violent in a red suit.

A. That is the one where we have to physically have to try to restrain him.

Q. Describe to me the training scenario.

A. To the best of my recollection, it was a guy in there that was throwing things. He had a knife. During it we were able to get him to drop the knife.

Q. How did you get him to drop the knife?

[34] A. By talking.

Q. Okay. How much time did you spend talking to the guy?

A. There was two of us in there. Probably about 3 to 4 minutes on that particular scenario.

Q. What happened after he dropped his knife? A. He attacked my partner.

Q. And what did you do at that point?

A. I came up behind him and did some—attempted to do some take-down holds and pressure point holds. And basically the two of us just wrestled the red man down until the instructor called break.

Q. Is your answer complete?

A. Yes.

Q. When I looked through your training Materials, and as soon as my exhibits are copied, we will go through them in a little bit more detail, it looked as though you had four hours of training as it relates to the mentally ill. How long are training days?

A. They are eight hours. That is not counting the PT—or that is counting the PT, any breaks we have. PT is usually about two hours. So, the classroom would have been four, scenario would have been an hour and a half, and then PT.

Q. And I also noted it looked like you had two hours [35] of training regarding contacting special populations. Would that have been on the same day; do you recall?

A. Not that 1 recall.

Q. I understand contacting the special populations includes not only the mentally ill but other disabilities and the elderly as well. Is that a correct understanding?

A. Yes.

Q. So, in that two hours as it regards contact with special populations, not all of it is mentally ill; you also have elderly and other disabilities?

A. Yes.

Q. Do you recall how much of that two hours' worth of training was focused on the mentally ill?

A. I do not.

Q. We are going to take a break and we will see where my exhibits are.

(Brief recess from 9:49 to 10:01 a.m.)

(Deposition Exhibit 1 was marked.)

Q. Officer, can you identify what has been labeled as Exhibit No. 1?

A. It looks to be a recruit training schedule.

Q. Have you seen this document before?

A. About five years ago.

MR. FRANK: Mr. White, do you know whether this was the schedule as it existed as of the time that the [36] officer took his training?

MR. WHITE: I couldn't tell you.

BY MR. FRANK:

Q. Officer, this was attached to the interrogatory responses, and do you recall reviewing this document to try to make a determination as to whether this was the training schedule that you had?,

A. No:

Q. Could you take a look at that, and just based on your recollection tell me if that looks like the training schedule that you did have?

A. To the best of my recollection, it looks like it could be.

Q. And you can't say for sure?

A. No.

Q. Did you keep your own copy of the training schedule?

A. No.

Q. If you will take a look at week 11. And if you will look on Thursday from, it looks like 1200 hours to 1400 hours. And under group B, interaction with special populations, mentally ill. Do you see that, sir?

A. Yes.

Q. It looks like that the training as it relates to interaction with special populations and interaction with [37] the mentally ill was combined into one training session. Do you recall whether that is so, Officer?

A. Say that question again. I'm sorry.

Q. It appears from looking at the training schedule that training as it related to special populations, which we have already talked about, the elderly, the disabled, and the mentally ill, was combined with whatever training you received relating to the mentally ill. Does that comport with your recollection of what occurred?

A. To the best of my recollection, yeah. It was five years ago.

Q. I understand that, Officer, and that is why we are trying to go by the document to the extent that we can. And it indicated that that training was four hours. Do you see that, sir?

A. Yes.

Q. And does that, again, comport with your recollection?

A. Yes.

Q. And then it looked like from 1400 hours to 1630 hours—let me go back. It appears as though that training was from 0730 to 1130; is that correct, sir?

A. Yes.

Q. And then it indicates that there is a second group, which is 1230 to 1630. Do you know the differences

* * * *

[42] state patrol officers were unhappy when he wouldn't raise his hand over his head. In a situation like that, you would agree if a person has a physical disability. which can be identified, you have to take account of that disability when determining how a suspect is responding to your commands?

A. Yes.

Q. You couldn't tell a paraplegic to stand up?

A. Correct.

Q. You could, but he isn't going to do it, right?

A. Right.

Q. Would it be fair to say, sir, when you are dealing with a mentally ill population, there are times when the mentally ill are unable to either understand, appreciate, or respond to your commands?

A. Yes.

Q. And that treating them in a humanistic fashion would mean that as with anybody else, you need to take account of that in dealing with them?

A. Yes.

Q. If you will go to page 2 of the document, which is Bates stamped 001466, the introduction says, "As officers, you will be expected to recognize behavior That indicates a -person has special needs requiring police intervention." Do you see that, sir?

A. Yes.

[43] Q. Do you agree with that statement?

A. Yes.

Q. Do you agree, sir, that you are trained to recognize behavior that indicates a person has special needs requiring intervention?

A. Yes.

Q. Do you believe that you were appropriately trained to recognize behavior that indicates a person has special needs requiring police intervention?

A. Yes.

Q. If you will look down at Roman Numeral II, subheading F, it says making decisions to intervene. Do you see that?

A. Yes.

Q. And it has five factors listed. Do you see that?

A. Yes.

Q. Okay. The first is, "Statements made by the person"; is that correct?

A. Yes,

Q. How do statements made by the person affect an officer's decision to intervene?

A. It is going to depend on what they are telling us. If, you know, they say they are going to kill you or kill themselves or kill others, that is one thing that you want to see. If they say, for instance, I am God and I believe [44] in nothing but peace, you are going

to react a different way. Like I said, every person is different. I haven't come across anybody that is the same.

Q. Let me ask you this, Officer: What if you were to encounter someone who expressed a significant fear of law enforcement people? How would you evaluate; how would you use statements made by the person to that regard?

A. I don't think I could answer that unless I was actually in that situation.

Q. Would you agree, sir, that that would be one of the factors that you would need to take into account in considering contacting that person?

A. Yes.

Q. Have you had any experience in your law enforcement career with populations of people that are distrustful or fearful of law enforcement?

A. Yes.

Q. Why don't you tell me about that experience.

A. I really can't pick one individual out They usually just usually young people have, you know, been taught that police are bad and they just don't like us for some reason. Or they are doing something illegal, so they don't want us around.

Q. Do attitudes towards law enforcement sometimes differ based upon the background in which the person grew [45] up?

A. I haven't seen that.

Q. Have you noticed—again, we can only base it on your experience. I am not asking you to tell me about a Los Angeles police officer. Have you seen any type of pattern based on ethnicity as it relates to fear or distrust of police?

A. I have not seen it.

Q. Have you seen any pattern as it relates to fear of officer or distrust of officer based upon socio-economic status?

A. Explain that.

Q. Sure. Poverty transcends all ethnic boundaries. Poor education transcends all ethnic boundaries. Although there may be ethnic populations that have a higher percentage, those are more socioeconomic factors as opposed to racial factors. Have you seen any socioeconomic factors that suggest to you a pattern as it relates to fear or mistrust of law enforcement officers?

A. Not that I remember.

Q. Did you receive any training as to how different ethnic groups may respond to officer contact?

A. I don't remember any specific ethnic groups and how they would respond.

Q. Have you received any training as to how different [46] socioeconomic groups respond to officer contact?

A. Not that I remember.

Q. F-2 indicates personal history. What does that mean and how is it considered?

A. That means if we know their personal history. I can give you an example that I—in my sector there is a lady that lives in my sector that we have been to her house 98 times. And I have been there 28 of them now. So, I know her. I know how she acts. I know what she is capable of. So, that I have personal history on.

99.9 percent of the times when we respond to calls, the city is so big and we have got so few officers, When I respond to a scene, when I see that person, that is the first time I have ever seen that person, that is the first time we know about that person, and it depends on—on those circumstances.

Q. When you are responding to a call, do you receive information regarding prior police contacts associated with that call?

A. If there are any, yes.

Q. Did you receive any information regarding prior police contacts with Mr. Herring?

A. Not that I remember.

Q. If there had been prior reports by Mr. Herring that would suggest bizarre behavior, would it be your [47] expectation that you would have been informed about that?

A. Yes.

Q. And to the extent you weren't informed, if that were the case, would you be critical of that?

A. Honestly, yes.

Q. And would it be fair to say, Officer, that part of the reason you would be critical of it is somebody failed to give you, the responding officer, the information and the tools that were available to you to appropriately handle the situation?

A. Yes.

Q. When you arrive at a scene, do you sometimes take steps to determine personal history even though you may not have had any kind of prior contact with the person?

A. If time permits, yes.

Q. What kind of steps do you take to make that determination?

A. Contact neighbors; family. If I have time I will get on the computer and pull up a history of the address we are going to.

Q. Would you agree, sir, that family members are a good source of information, particularly when it comes to mental health history?

A. I think they are the best.

Q. And that when one is dealing with some kind of [48] acute mental health episode, family members are oftentimes good source of information as to how that particular occurrence was developing?

A. Can you explain acute?

Q. Yes. Comes on. Just a relatively sudden event as opposed to a chronic event that has taken years and years to develop.

A. I would say yes.

Q. No. F-3 is opportunity to act dangerously. What does that mean?

A. That means the person is currently attempting to break into homes, hurt somebody, hurt themselves. Usually it is themselves. That there are weapons or items that can be used as weapons around them.

Q. Let me address that, Officer, because this is something that I hear a lot. And it always kind of puzzles me. In any situation where an officer arrives at a scene, there are things that can be used as weapons; is that correct?

A. Yes.

Q. That you could be responding to my office and there were plenty of things in this office I could use as a weapon?

A. Yes.

Q. So, the presence of the possibility of items that [49] can be used as a weapon is present every time that you show up at a scene, correct?

A. Yes.

Q. And that what you need to do, Officer, is make a determination as to whether there is probable cause to believe that somebody is going to use something as a weapon, correct?

A. Yes.

Q. And without having probable cause to believe that someone is about to use a weapon, the mere fact

that there could be weapons is not sufficient, correct, sir?

A. Yes.

Q. And the same goes true for any situation that involves whether persons may be present: As an example, when you came to my office this morning, there may or may not be people present upstairs, correct, sir?

A. Correct.

Q. And you can hear the creaking of the floor and you can hear people talking, so you would have reason to believe that people are upstairs, correct?

A. Yes.

Q. And that just like a weapon may be present, when you are dealing with whether a person may be present, what you need is actual information that would give you cause to believe that people were present, right, sir?

[50] A. When we are in an environment that we don't know if anybody is present, we just assume that there is. We take the one—plus-one rule. Always assume there is somebody else there.

Q. Well, that is when you are dealing with officer safety issues, right?

A. Yeah. That is pretty much any call we go to.

Q. But officer safety issues are different from issues associated with when you enter a home, correct?

A. They are one and the same. We enter somebody's home, we are going to—officer safety issues are going through our minds.

Q. Let me ask it differently. In order to enter someone's home without a warrant, you need probable cause is believe certain circumstances exist, correct?

A. Yes.

Q. And in order to enter someone's home based upon the presence of a person that may be being injured by a suspect, you need probable cause to believe there is somebody in there being injured by the suspect, right?

A. If it comes to human safety, we can act on reasonable suspicion.

Q. As opposed to probable cause?

A. Yes.

Q. All right. So, reasonable suspicion, that is not [51] a could be, you have to have some information, right?

A. We have to have some reason to believe there could be somebody in there, yes.

Q. And if you don't have reason to believe that, you can't enter based on that reason?

A. Correct.

Q. When looking at the opportunity to act dangerously, would you agree that one of the things that you consider is whether the person can be readily observed by law enforcement?

A. Yes.

Q. Would you agree that one of the things that you would consider is whether they had an opportunity to harm someone before officers arrived but did not take that opportunity?

A. Yes.

Q. Would you agree, sir, that among the opportunity to act dangerously information you consider is whether when a person is in the presence of law enforcement and are acting aggressively or violently, that aggression is directed towards other people or the officer or inanimate objects?

A. Or themselves.

Q. Or themselves?

A. Yes.

[52] Q. So, for example, an individual acting aggressively or violently towards law enforcement personnel would demonstrate a higher opportunity to act dangerously then with violent acts towards furniture?

A. Yes.

Q. No. F-4 is the amount of control person demonstrates over himself. What does that mean?

A. Basically it just means how they are—how they are acting, how they are—it is kind of hard to explain in words.

Q. Let me ask you some more pointed questions, Officer, because again I am not trying to play hide the ball here. Part of what you have to determine when you arrive on a scene, particularly when you are dealing with the mentally ill, is whether even if they are suffering a mentally ill crisis, whether they have some control over their behavior, correct?

A. Yes.

Q. And the degree of control is going to be on a graded scale. Some people have a lot of control; some people have little control, correct, sir?

A. Yes.

Q. So, for example, in this deposition, you are a very Controlled person, but when you are watching an Atlan Braves game you may have less control, right?

[53] A. Yes.

Q. And what you try to do is you try to take a look at the circumstances and say, okay, this guy is acting bizarrely, but he is controlling his behavior to a certain extent; correct, sir?

A. Yes.

Q. And the degree to which that person is able to demonstrate control would again be a factor that you would consider, correct, sir?

A. Yes.

Q. So, for example, sir, if a person were upset and angry and was destroying inanimate objects but taking efforts not to harm people, that would demonstrate at least some degree of self-control; correct, sir?

A. Yes.

Q. F-5 indicates the explosiveness of a person's environment. What does that mean?

A. That just means the surrounding—their surroundings. Somebody who is by themselves is less likely to harm others, but they still may harm themselves.

Q. I am not—again, I am not trying to hide the ball. Some of the literature that I read also refers to whether there are antagonistic people around egging the person on, those kinds of things.

A. That is where I was going. If a guy is out in the [54] middle of a city street and he is acting bizarre and all of a sudden three passerbys decide they want to be Good Samaritans and jump on them, that could become explosive. When it might have been easier to let us handle it or let him rant.

Q. Would you agree That part of your obligation as a law enforcement officer is do everything you can do to make sure that a person is not placed in an explosive environment?

A. Yes.

Q. Would you agree, sir, that part of your obligation as a law enforcement officer, particularly as it relates to the mentally ill, is to the extent possible to deescalate the crisis?

A. Yes.

Q. Why don't you tell me about the training that you have as it relates to deescalating crises.

A. We have gone through what is called verbal judo. I don't know if you have ever heard of that.

Q. Well, I know plenty about judo being a judo player, but I don't know much about verbal judo. Why don't you tell me about that.

A. I don't remember the author of the book, but he wrote a pretty good training program on just how to communicate with people and deescalate situations whenever [55] possible.

Q. Do you recall the name of the author?

A. I just said, no, I don't remember the author.

Q. I'm sorry. Sometimes, Officer, I will be listening to one part of your answer and fail to get the whole thing. Do you know the name of the book?

A. Verbal Judo.

Q. Do you have a copy of this book?

A. I do not.

Q. Where did you read a copy of this book?

A. It was while I was in the academy, they had it.

Q. Did you read the entire book?

A. No, I just read passages from it.

Q. Who decides what passages you would read and not read?

A. I did. I just kind of picked it up and read a chapter here and there. Never read through the whole thing.

Q. Do you believe that book to be authoritative in its field?

A. I believe it to be very good.

Q. Would you agree, sir, that it represents a model of behavior to which a law enforcement officer should aspire as it relates to deescalating crises?

A. I do.

Q. Tell me how you deescalate a crisis as a law [56] enforcement officer.

A. One of the things I like to try and use personally is I like to try—you remain calmer than them. A lot of times I will lower my voice. Because if

they can't hear you, they have to stop screaming and hollering so they can hear what you are saying. A lot of times that will bring it down.

One other thing I like to use is I never accuse. Never say if you don't stop, you are going to, you know, this is going to happen. Try to always keep that neutral. And that helps a lot. The second you start accusing anybody, that just—they are going to—their level is going to keep going up.

Whereas, if you accuse an inanimate object for what is going on, these people, plus you are talking quietly, these people start calming down, and eventually they may be able to talk to you on a somewhat normal level.

I am not medically trained, so I am never going to be able to totally deescalate. I may not get them to walk down the street all happy. But my goal is that he doesn't get hurt or she and I don't get hurt.

Q. gain, Officer, I am not trying to be facetious, but your role as a law enforcement officer isn't to make them happy; your role is to assure your safety, the safety of the public, and the safety of the people you are [57] contacting, correct?

A. Correct.

Q. And do you believe that the principles as set forth in the verbal judo book represent an appropriate method of police response in that regard?

A. I do.

Q. Do you believe that a law enforcement officer should attempt to deescalate a circumstance before utilizing physical force?

A. If possible, yes.

Q. Do you agree that to the extent possible law enforcement officers should avoid creating an explosive environment?

A. Yes.

Q. If you look at Roman Numeral II, subparagraph G, it says, "Examples of appropriate intervention (mental illness: Police response part I video.)" Do you recall seeing a video on that?

A. I recall videos, but I don't recall the video, particularly.

MR. FRANK: Mr. White, do you know whether that video is being copied and given to us?

MR. WHITE: No. Not at this time.

MR. FRANK: May 1 request a copy of that video?

MR. WHITE: We will check to see if it exists.

* * * *

[70] that took place between Officer Darress, Officer Darress you anticipate would be in the best position to relay the content of those conversations?

A. Yes.

Q. On the bottom of page 001475, the left-hand column, it indicates in the last paragraph, "Remember that -people with mental illness who are aggressive or who make Violent threats often feel threatened themselves and can actually become violent when they feel they are cornered. The police may defuse a potentially dangerous situation by being present." Did I read that correctly?

A. No. The last word is patient.

Q. Did I say present?

A. Yes.

Q. Thank you. Thank you for the clarification. Do you agree with that statement?

A. Yes.

Q. What does being patient mean?

A. That is time permitting, we like—we like it when we have time on our side. If we don't feel that somebody's life is in immediate danger, we can wait all day. That is being patient. It takes a lot of patience to stand outside a house for 12, 13 hours.

Q. In this situation where you have the time to be patient, that is the—that is the time that you had to [71] call a supervisor, correct?

A. Correct.

Q. I believe I previously asked you whether CSPD had a designated mental health officer or liaison. Did I ask you that?

A. Yes, you did.

Q. And my recollection is you told me that you didn't think so?

A. No. Yeah, I don't think so.

Q. Do you know at the time whether the CSPD had a CIT team? ,

A. At that time we did not.

Q. Do you now?

A. I have seen officers with the CIT on their shirt.

Q. Are you part of the CIT team?

A. No.

Q. Have you received the CIT training?

A. No.

Q. What officer do you recall with the CIT on the shirt?

A. Officer Kyle Sack.

Q. Are you friends with Kyle Sack?

A. I am.

Q. Have you discussed his CIT training with him?

A. No.

[72] Q. On the right-hand column of 001475, there are two lists. What to do and what not to do. And I

would like to take a look at what not to do. "Do not move suddenly, give orders rapidly, or shout." Why shouldn't you do that when you are dealing with the mentally ill?

A. Well, in a lot of cases you shouldn't do that with anybody, but it might it affects them a little bit more. A lot of times mentally ill are scared of what is going on. If you move suddenly or shout, it just enhances their fear.

Q. And, in fact, Mr. Herring indicated he was afraid of the police and thought they were there to hurt him, right?

A. I didn't hear that.

Q. Have you read that in any reports?

A. No.

Q. Is that something that you would want to know in dealing with the mentally ill person?

A. Yes.

Q. Nobody told you that?

A. No.

Q. Would kicking in a door constitute moving suddenly?

A. If they were in the same room that you kicked it in, yes.

Q. If I am in my house and somebody kicks in my door, [73] even if I am in my kitchen, I am going to consider that a sudden action, wouldn't you?

A. Yes. If I heard it.

Q. No. 5 says, "Do not crowd the person or move into his or her buffer zone of comfort." What does that mean?

A. Well, I would—personally I would say that is don't stand within 3 or 4 feet of them. Be at least an arm length away from me is my buffer zone. I try to keep that in my mind when contacting others.

Q. Why is that important when dealing with the mentally ill?

A. Because if you are real close they think you can touch them quickly.

Q. Does that also go along with the paragraph that I misread on the bottom of the left-hand column where it indicates that they can become violent when they feel cornered?

A. Yes.

Q. Would you agree when dealing with the mentally ill, one of the things that you want to try to avoid are getting into a close physical proximity with them in a small environment where they may feel cornered?

A. Yes.

Q. A bathroom is a small environment?

A. Yes, it is.

[74] Q. Hallway is a small environment?

A. It can—it depends.

Q. At least side to side it is, right?

A. Yes.

Q. Under what to do, the second bullet point is, "Gather information." As we discussed before, you personally didn't make any attempt to do that when arriving at this scene, correct?

A. No.

Q. No. 5 says, "Remove distractions, upsetting influences, and disruptive people from the scene." Would you agree that there are certain circumstances that when dealing with the mentally ill, officers themselves, their uniform, their weapons, the way they carry themselves, those things can be upsetting influences in relation to the mentally ill?

A. Yes.

Q. Do you believe that those upsetting influences would be magnified were the officers to undertake

aggressive acts towards a person suffering a mental illness?

A. Once again, it just depends on the situation.

Q. Let's take Mr. Herring's situation. And I want you to assume for the purposes of this question that lie has already expressed fear of law enforcement; that he has already expressed that law enforcement is there to hurt him, [75] okay?.

Under that kind of situation, when you forcibly enter an apartment and are in a relatively close physical proximity to a person after doing so, that is an upsetting situation for somebody, isn't it?

A. Assuming those comments, yes.

Q. Would you agree that when you are dealing with the mentally ill you need to take into account that you may not have any kind of rational conversation with them?

A. Yes.

Q. No. 7, it reads, "Recognize that the person may be overwhelmed by sensations, thoughts, frightening beliefs, sounds, or the environment." Do you see that?

A. Yes.

Q. And it is important when you are responding as an officer to understand and know all of those things, correct?

A. Yes.

Q. Would you agree that Mr. Herring was overwhelmed by sensations, thoughts, frightening beliefs, the environment he was in, as of the time of your contact?

A. Yes.

Q. Would you agree that kicking in a man's door generally wouldn't be considered by most people to be a patient, accepting, and encouraging way of interacting with somebody?

[76] A. Yes.

Q. And on the list of what to do, I believe it is No. 8, it says, "Be friendly, patient, accepting, and encouraging, but remain professional."

A. Yes.

Q. No. 9 reads, "Be aware that your police uniform, gun, handcuffs, and nightstick may frighten the person." Do you have any information regarding how Mr. Herring reacted to those specific things?

A. No.

Q. The immediate next line reads, "Reassure him or her that you don't intend harm."

A. Yes.

Q. Would you agree that reassurance of something like that comes not only verbally but also by the way you are acting in relation to a person?

A. In some situations, you know, there are certain situations where we can't let our guard down. We may still took like we are taking a defensive posture because we are trying to reaffirm verbally.

Q. The last bullet point of what to do is to announce your actions before initiating them. Did you, prior to entering Mr. Herring's apartment, announce to him that you were doing so?

A. I did not.

[77] Q. Did Officer Ambuehl?

A. I don't know if he did or not.

Q. Do you know whether Officer Darress did?

A. I do not.

Q. Do you agree with the statement that failure to follow police directions during the psychotic episode is most likely not a deliberate act of defiance?

A. Yes.

Q. Did you have sufficient opportunity to observe Mr. Herring to make a determination as to whether he was suffering some form of psychosis?

A. No.

Q. Did you have sufficient opportunity to observe Mr. Herring to make a determination as to whether he was suffering some form of delusion?

A. No.

Q. If you take a look at page 001478. This page lists a number of mental illnesses and gives a brief description of each of those; would you agree with that assessment?

A. Yes.

Q. And that these are items that you as a police officer are trained in, right?

A. Yes.

Q. The second one listed on the left-hand column is [78] delusions. And the third sentence reads, "A person with delusions from a brain disease may believe that he or she is controlled by aliens, is Jesus Christ, is having his or her thoughts broadcast over television, or is the subject of a search by British agents intent on murder." Do you see that?

A. Yes.

Q. Statements made by Mr. Herring to the extent that they were made professing a belief that he was God or was Christ would pretty much fit right in with that specific definition, wouldn't it?

A. Yes, it would.

Q. And, again, expressing—and I would like you to assume for the purposes of this question, the fear of law enforcement would also be somewhat similar to the subject of search by British agents, again, expressing a fear of authority, correct?

A. Yes.

Q. Did you have sufficient opportunity to observe Mr. Herring to make a determination as to whether he was suffering either hallucinations or schizophrenia?

A. I did not.

Q. Did you have sufficient opportunity to observe Mr. Herring to make a determination whether he was suffering any type of manic-depression or bipolar disorder?

[79] A. No, I do not.

Q. In the middle of that paragraph, discussing manic-depression, it reads, "In the manic phase of this illness, symptoms can include hyperactivity, explosive temper, impaired judgments, increased spending and sex drive, accelerated thinking and speaking, aggressive behavior, grandiose notions, and often delusions." Did Mr. Herring, based upon your observations, exhibit any of those behaviors?

A. Yes.

Q. Which did he exhibit?

A. Explosive temper, hyperactivity, aggressive behavior, and the delusions, from what I saw.

Q. Would you agree, sir, that based upon what you saw, Mr. Herring was suffering a mental health crisis?

MR. WHITE: Objection. Calls for a mental health conclusion or a medical conclusion.

MR. FRANK: Let me go back and ask some questions.

BY MR. FRANK:

Q. Part of your training is to make at least enough of an assessment that you can make determinations as to, whether you are taking a person to a facility, right?

A. Yes.

Q. Part of your job is to make at least enough of an assessment to determine how you as an officer can best [80] approach contact with that person, right?

A. Yes.

Q. All right. So, based upon your training as an officer, and understanding that you are making these determinations for purposes different than a mental health care provider, it is your opinion that he was, in fact, suffering some type of mental health crisis?

MR. WHITE: Objection for the same reason. Also it is leading.

MR. FRANK: I am allowed to lead.

Q. Go ahead and answer the question, Officer.

A. From what I saw, I didn't know if he was mental illness or drug use.

Q. Doesn't your training require that when you can't make that determination, to assume it is mental illness?

A. Yes.

Q. Were there any other training materials or training aids relating to your 18-week training program that you can recall that we have not discussed?

A. Not that I can recall.

Q. During the 3.5-month field training program, what training did you receive regarding mental illness?

A. Just regular field training, when it come up, the way training used to be done is you would have this big book of training; and you would have to discuss a situation, [81] observe a situation, and then handle a situation. And dealing with somebody who was mentally ill was part of that.

Q. How does the three and a half months of field training work? Is that like you are riding with another officer and that officer is giving you training? Describe to me the program.

A. That is, yes, you ride with a certified training officer for three and a half months. He observes you

do on the job. He will discuss on the job, he will have you observe him do on the job, and then he observes you do on the job. And then he or she recommends whether or not you pass. You go through three different trainers.

Q. Now, you had indicated that there was a book of training. What were you referring to there?

A. It is—the field training book. When I did it, that is how they did it. It is a little different now. But it has got a it was real thick, had a list of everything you needed to accomplish on the street before the training was over. All the kinds of reports you had to do, all the kinds of situations you had to be involved in.

Q. Were you given an individual copy of that?

A. No. It is something that they—that was filled out and left in—in his care. I don't know what happened to it after that.

Q. By his care, do you mean the training officer's [82] care?

A. Correct.

Q. And you indicated that there would be three training officers. Was that book transferred among them?

A. Yes.

Q. And do you know what happened to that book when you were done with it?

A. I do not.

Q. Does somebody write in that book?

A. Yeah. The training officer wrote in the book that on such-and-such a date and time you did this. The report was done, that kind of stuff.

Q. Tell me what specific training you can recall relating to the mentally ill that occurred during your three-and-a-half-month training program?

A. I can't think of anything specific. I remember one person specifically. He is one of our local transients.

Q. Tell me about that experience.

A. He is a male that he was—had dual personalities. He thought he was his twin brother. And he wore a towel on his head to keep people from reading his thoughts.

Q. Was your contact with that gentleman, was it violent in any way?

A. Never.

[83] Q. We had discussed briefly the daily training briefings that you received. Do you recall any training on a daily basis relating to the mentally ill?

A. I don't recall. Over the four or five years the topic of the day is always something different.

Q. Do you get handouts?

A. No. It is just something that the sergeant reads and we discuss.

Q. Do you keep notes?

A. No.

Q. When I deposed Chief Velez he indicated you guys would get some fairly well-prepared video presentations that were entertaining and informative. Is that a good description of what you get from time to time?-

A. Yeah, those are roll call videos, yeah.

Q. Do you recall any roll call videos specifically dealing with interaction with the mentally ill?

A. I don't recall one specifically. I have seen so many, though.

Q. Are you shown them every day of training, or how often?

A. No. The roll call videos, in fact, I haven't seen one in a couple of months. We have a daily topic that we discuss.

Q. Your in-service training days, can you recall any [84] in-service training days specifically directed toward interacting with the mentally ill?

A. I did take one this year on communication skills.

Q. Was that specifically referencing -

A. It wasn't specifically, but it was brought up.

Q. Who was that put on by?

A. It was actually—I don't remember the officer that taught it. It was CSPD that did it.

Q. Any written materials?

A. No.

Q. The ten hours of elective training, have you had any elective training relating to contact with the mentally ill?

A. Not the mentally ill, but I have taken like diversity training to deal with different kinds of populations.

Q. Does the diversity training specifically address mentally ill people?

A. Yes, it did in there. We talked about that.

Q. When did you take that training?

A. About four, five months ago.

Q. And who put on that training?

A. The City of Colorado Springs was given at the administration building.

Q. And were the instructors all CSPD officers?

[85] A. No.

Q. Who were the instructors?

A. I would have to find the paperwork to find out their names. I don't remember their names. They worked for the city. One works for Park & Rec and one actually works in accounting.

Q. They were city employees, not just CSPD employees?

A. I was the only CSPD person there.

Q. How did it come about that you were the only law enforcement guy there?

A. I was one of the only ones that wanted to go at that time.

Q. Is there any other training as it relates to contact with the mentally ill that we have not discussed this morning?

A. Not that I can remember.

Q. We are doing real good on time, Officer. We are going to get you out of here earlier than I had planned. I saw Mr. White looking at his watch. I figured I should say that.

MR. WHITE: I always do that.

THE WITNESS: If I look at my watch, it is not because I am impatient. It is a habit.

BY MR. FRANK:

Q. How did you first hear of the Herring matter?

* * * *

[110] gaps in it caused for whatever reason, communication, equipment, et cetera?

A. Yes.

Q. Is it your recollection that Officer Darress had arrived only about 3 minutes before you did?

A. It seemed like a lot longer than that, but—

Q. How much time did it seem like?

A. When you have an officer calling, you know, for code I and stuff, time slows down a lot. It seemed like at least five, that lie was at least there five, ten minutes before we were.

Q. Is there a document that I could look at that would accurately delineate that for me?

A. Not that I know of.

Q. Looking back at PL.00366, you received information stating that someone had called in stating that a neighbor is banging on the front door, possibly trying to get inside.

A. Correct.

Q. Do you have any information that that report was inaccurate?

A. No.

Q. Next entry is RP, and I assume that is reporting party, correct?

A. Yes.

Q. Is in house. Suspect outside right now. Do you [111] have any reason to believe that that is incorrect?

A. No.

Q. The next entry says no weapon. Is that correct?

A. Yes.

Q. And the reason why I am asking, I know it is a silly question; it says w-e-a-p, and I am assuming that means weapon?

A. When they write no weapon, that means no weapon is seen.

Q. And did you have any information contrary to that?

A. No.

Q. What does it mean to if a person is armed, if I say that to you?

A. As an officer, I am going to think you have a deadly weapon.

Q. So, when I ask you if Mr. Herring was armed, the way that you understand that question is I am asking you whether Mr. Herring had a deadly weapon?

A. Correct.

Q. And is that a standard usage of the term "armed" within police circles?

A. Yes.

Q. So, to the extent that that specific language was used, you would have no confusion as to what was being asked of you, right?

[112] A. Correct.

Q. So, if I asked you if somebody was armed, you would be able to tell me that?

A. Yes.

Q. The next entry is "verbal." What does that mean? A. It means that the disturbance is verbal.

Q. What does that mean?

A. It means nobody is getting beat up at that particular point in time, that they can see or know.

Q. So, as of this time index, and I know that you may have not received it at this time, as of time index 14:34:34, what was known is that a neighbor is saying that somebody is banging on his door; that the reporting party is inside. The suspect is outside. There are no weapons shown. And this was a verbal as opposed to a physical altercation?

A. Correct.

Q. The next entry is, "Unknown if suspect is at door now or not" Is that a correct reading of that entry?

A. Yes.

Q. What does that mean?

A. It means that the call taker probably asked, "Is he still at your door?" And, "I don't know, I am in my bedroom."

Q. Suspect named Greg, and I assume that BM means [113] black male, 35 years old, 6 foot 2, 240. I am assuming that the 602 is 6 foot 2 and 240 is referring to pounds, with short black hair; is that correct?

A. Yes.

Q. So, at that point the dispatch, and as it was related to you, you would know that you were dealing

with a man named Greg who was 35 years old, African-American, about 6 foot 2, and 240 pounds?

A. Correct.

Q. At that point, I can't tell from this, would you know what the man's last name was?

A. No.

Q. So, the reporting patty said, hey, this is Greg from across the street, or wherever he is from, and that is what was conveyed to you?

A. Yes.

Q. The next entry says, "Unknown clothing," What does that mean?

A. LSW means last seen with unknown clothing. That means at that point the RP doesn't know what he was wearing.

Q. So, would it be a fair description to say that the person taking this call and relaying the information to the dispatcher was trying to figure out a description of the suspect, whether he was a Caucasian, Latino, African-American, how tall he was, how much he weighed, what [114] he was wearing, information that you as an officer would know what you were looking for?

A. Is the call taker is trying to get that information?

Q. Yes. And convey it to dispatch so dispatch can convey it to you?

A. Exactly, yes.

Q. The next entry is "no INJ." What does that mean?

A. No injury.

Q. And, again, do you have any information to contradict that?

A. No.

MR. WHITE: Can I clarify? No injury as to who?

BY MR. FRANK:

Q. That's fine. Answer the question, Officer. Again, I am not trying to pull a fast one. I just want to know.

A. That usually means no injury to the reporting Party.

Q. Now, it usually means that. Does this say that?

A. No.

Q. Do you reed] when this call came in whether there was a delineation as to who may or may not have been injured?

A. No.

[115] Q. Then what was conveyed to you is no injury was reported?

A. At that time, yes.

Q. That's right. And all that was reported was a verbal confrontation?

A. Correct.

Q. The next entry, "Suspect not at front door now." Is that a correct reading?

A. Yes.

Q. And any reason to—any information you had contrary to that?

A. No.

Q. "Suspect lives in apartment just north of reporting party's." Do you have any information to dispute that?

A. No.

Q. "Kids now running away from apartment. Containers and furniture being thrown out of the apartment." Is that a correct reading?

A. Correct.

Q. Was that information conveyed to you?

A. Yes.

Q. Did you have any reason to believe that that information was untrue?

A. No.

[116] Q. "Unknown ETOH/drugs." I am assuming that means alcohol use or drugs, correct?

A. Correct.

Q. And what that was reporting to you was it was unknown whether there was alcohol and drugs involved, correct?

A. Correct.

Q. And do you have any reason to dispute that that was known or unknown?

A. No.

Q. What does the 113D2 mean?

A. I could not tell you. I do know it appears every time a call taker hangs up with the reporting party.

Q. And then there is an RP calling back. So, it looks like the reporting party called back, correct?

A. Correct

Q. And it looked like at least as far as we can see from the time index on this particular exhibit that there was, I don't know, about 30 seconds maybe, the person hung up and called right back?

A. Yeah, roughly. That is a good approximation.

Q. And then the next entry is suspect, I am assuming that is what it means, "Greg is now nude, in Greg's apartment with bleeding arms," correct?

A. Correct.

[117] Q. And so do you have any information to dispute that?

A. No.

Q. So, would it be fair to say that the information given to you of which you had no other information to counteract would be that this started out as a verbal altercation with no weapons and no injuries noted, to kids running away from the apartment, and con-

tainers and furniture being thrown out of the apartment, to somebody being nude and in their own apartment?

A. That's correct.

Q. Okay. Now, the remainder of the information, "Suspect in his own apartment now tearing up apartment," was that relayed to you?

A. Not that I heard.

Q. Was any information relayed to you by dispatch or by computer that we have not discussed when discussing up to-time index 14:41:15?

A. No.

Q. After time index—let me back up. It appears as though you were initially dispatched at 14:36:12; is that correct?

A. Yes. That is when the computer registered it, yes.

Q. And. again. I am using rough approximations, [118] although it is not real rough, it is almost exactly, that is 2 minutes after the call came in, right?

A. Do you mean the original call, or when the dispatcher got it from the call taker?

Q. When the dispatcher got it from call taker. It looks like 14:34:05 is dispatcher from call taker. And 14:36:12 is when you were dispatched.

A. Yes. It is when my computer was dispatched, yes.

Q. So, about a 2-minute lag?

A. Correct.

Q. And it shows you arriving at 14:49:37, correct?

A. 14:49:37.

Q. Correct?

A. Correct.

Q. And looking at this, can you tell when you would have lost communication?

A. I would say it was around 14:41:22.

Q. If you will take a look at PL 00367, There is an entry that says suspect deceased. That is 15:09:18.

A. Okay. I found it.

Q. And then if you look above that, need medical inside is 14:53:11; is that correct?

A. Correct.

Q. So, about 17 minutes, again, I know that this is just caller to dispatch, it looks like about 16 minutes from [119] the time on need medical inside to suspect deceased?

A. Approximately.

Q. And approximately 3 minutes from kicking in the door to need medical?

A. Yes.

Q. And approximately nine minutes from when you lost communication to kicking door in?

A. Yes.

Q. Why don't you go through that nine minutes with me. Your radio cut out at 14:41:J5 as you were approaching Stetson Hills, and obviously you have no instantaneous transportation, so a period of time required you to get to the scene and then to speak with the gentleman that says, hey, your other officer is over there, and then to get -there.

So, would you take me through the time sequence, Officer? Because I can't piece it together with this, I don't think, unless looking at this you can kind of piece it together for me.

A. Possibly a little. About the time—when I lost communication, like I said, I was at Powers and Stetson. We were actually sitting at a light at that time. Then we went, when I looked down to the computer I heard a chime; we went code 1 at 14:47:43.

Q. 14:47:33?

[120] A. I think it is 43. It is kind of blurred.

Q. Do you mind if I lean over, Officer? I apologize.

A. I can't tell if it is 14:47—I think it is 48. His is clearer than mine.

Q. 14:47:48. Now let me stop you there. At 14:47:48, you got a chime, which indicated to you you needed to go code 1, right?

A. Yes.

Q. And code 1 as we discussed before is an officer needs help, you all stay off the radio?

A. It means radio silence unless you are involved.

Q. So, you would assume that as of 14:47:48, Officer Darress was on scene?

A. Yes.

Q. Okay. And if you look back over to PL 00368, it looks like 4 Adam 61 arrived at 14:46:58. So, you would agree that looking at those, it looked like what most likely happened is Officer Darress arrived at 14:46:58, and then subsequently by 14:47:48 said, okay, we need help here?

A. Yeah. That is about a minute, and then he asked for a code 1.

Q. So, Officer Darress on scene about a minute before code 1. How is it that you could get the code 1 chime but not receive the communications occurring between 14:41:22 and 14:47:48?

[121] A. I was driving. When I am driving, I don't look at the computer. And I sit at a stoplight and it chimes again and I look down. Plus the screen scrolled. So, information gets disappeared once it scrolls up. That was a problem that we fixed. So, when you are driving I don't look at the computer. I like to keep my car intact.

Q. Okay. So, the information occurring from 14:41:22 to 14:47:48 may have actually been received by your computer, but you were driving and you weren't looking at a computer screen, correct?

A. Correct.

Q. When you came to a stop at the apartment complex, did you take a look at your computer screen?

A. At the apartment complex?

Q. Yes.

A. No.

Q. Did you stop at any time between the intersection of Powers and Stetson Hills and arriving at the scene?

A. No,

Q. How long did it take you to drive from Powers and Stetson Hills to the scene?

A. It was less than a minute.

Q. So, you were real close?

A. Yeah, yeah. We could actually see the apartment complex from where I was at.

* * * *

[122] Q. How long did it take you to get out of your car and speak to the person that said, "Hey, your officer is over there"?

A. As soon as I—as soon as we pulled in there, worked our way through the apartment complex to find the right address, I get out of the car, probably 30 seconds to a minute. Two minutes maybe. Because we shut the code 3 down in the apartment complex.

Q. In other words, no lights and sirens when you went into the apartment complex?

A. Correct. And we slow it down, too.

Q. Little kids would be running around?

A. Exactly.

Q. So you got anywhere from 30 seconds to 2 minutes to find your way through the complex and park.

A. Correct.

Q. So now we are up to anywhere between a minute and 30 and 3 minutes.

A. Correct.

Q. Go ahead.

A. Then once we got out of the car, he says to me and Ambuehl are actually standing there looking, because like I said, it was eerily quiet. We saw Officer Darress' car but we don't see him. Just when I was about to try the radio again to see if I can get out, the guy says, "Your officer [123] is behind that building over there,"

Q. And about how long did that whole process take?

A. With my tunnel vision or reality? It seemed like forever. But probably about a minute.

Q. Okay. Then how long to get to where Officer Darress was located?

A. 45 seconds.

Q. So, inside of five minutes from the code 1—actually you got the code 1 when you were sitting at Powers and Stetson?

A. Correct.

Q. So, within five minutes of getting the code 1 at Powers and Stetson, you were present on the scene?

A. Correct.

Q. And that means that you would have been on the scene about four minutes before the reference to kicking in the door?

A. On the computer, yes, approximately.

Q. Does that comport with your recollection, Officer?

A. To the best of my recollection, yeah. Like I said, when you get in those situations, time kind of slows down.

MR. FRANK: If you don't mind, I am going to take a break.

(Brief recess from 12:32 to 12:37 p.m.)

[124] BY MR. FRANK:

Q. Officer, would you please tell me what you understood the circumstances to be at the time that you physically stepped out of your police car on scene?

A. At that point all I knew was that an officer was somewhere and was asking for code 1. I had no clue why he was asking for a code 1.

Q. When you had the information that had been conveyed to you before 14:41:15—excuse me, 22, right?

A. That is correct, yes.

Q. And aside from, all right, there is an officer saying he needs a hand, and that information, did you have any other information?

A. No.

Q. The person that you spoke with when you arrived on scene, did that person identify themselves?

A. No. Only thing he said was the other officer is behind that building.

Q. Was that person injured in any way?

A. Not that I saw.

Q. Did that person indicate anybody was injured?

A. No.

Q. Did that person tell you anything other than, you know, your officer is behind that building over there?

A. No.

[125] Q. And I think you told me it took you about 45 seconds to get around the building to where Officer Darress was?

A. Correct.

Q. What did you see—from the time you stepped out of your car to the time you saw Officer Darress, what did you see?

A. I stepped out of car. Couldn't see the apartment at first. He pointed to the apartment. The way it is set, we had to run around the corner of one apartment because it is like a snake run. When we saw the corner apartment on the—that building that he was pointing to, all the windows were broken out. There was children's clothing and furniture and toys out in the common lawn.

Went around to the other side. I don't remember seeing any windows on one side of it, on the first turn. Then the second turn I could see Darress standing kind of it the middle of the lawn/field. And there was another window with broken glass with stuff laying outside, pieces of furniture and clothing and items.

And then I kind of stopped on a corner where could see a window broken out, and I didn't see anybody at first. I just saw items flying out of the window.

Q. Was Officer Darress dodging items as they came out the window?

[126] A. Yes. He was backing up. At that point he backed up so they couldn't reach him.

Q. Do you know whether Officer Darress was of the opinion as to whether stuff was being thrown at him or not?

A. I don't know what he was thinking.

Q. Would you agree that Officer Darress would be in the best position to form an opinion as to whether items were being thrown out of the apartment, or whether they were being thrown out of the apartment at him?

A. Yes.

Q. Would you agree that as a police officer, that would be an important distinction?

A. Yes.

Q. Because as we have discussed previously, one of the estimates you look at is the amount of control, and throwing items out of a window as opposed to throwing them at an officer, not only demonstrates at least some control, but it also demonstrates that somebody isn't directly trying to harm the officer at that point, right?

A. Yes.

Q. Would you describe for me when you saw Officer Darress how far away from the window he was?

A. To the best of my recollection, probably about 25 yards.

Q. 25 yards?

[127] A. Yeah. He backed up quite a ways when I got there.

Q. All right. Where did he start and where did he end?

A. I don't know where he started. When I got there, he was backing up, but he had only backed up about six feel

Q. Now, five yards is to me a pretty fair distance to throw something at somebody. Was he beyond the range at which the majority of the items had landed?

A. Not very far beyond the range.

Q. Was he beyond the range?

A. Yes, at that point.

Q. It was a ground-level apartment?

A. Yes.

Q. So, it wasn't things dropping out of the sky on him?

A. No.

Q. And how was he standing?

A. What do you mean?

Q. Well, we had talked about how an officer stands, and you had described that a noncombative stance would be more squared up, arms at the side as opposed to crossed, a little bit loosely. Describe how Officer Darress was standing.

A. Okay. He was standing out in the open, his arms down by his side, that I remember, and standing looking [128] straight at the windows.

Q. Did he have his gun drawn?

A. No.

Q. Did he have his hand on his gun?

A. Not that I saw.

Q. Describe to me Officer Darress' actions as you observed them.

A. He was just standing there and talking to the window.

Q. Could you see inside the window from the corner?

A. When I first got there, no. I had to reposition myself to see inside of it, though.

Q. Let's not talk about repositioning yourself yet. So, you show up there. Officer Darress. is about 25 yards, not feet but yards, from the window. And he was a little bit beyond the range where the majority of the items had been thrown, correct?

A. That I saw, yes.

Q. And at that time whateverthe risk was that was perceived by Officer Darress, it wasn't sufficient for him -to have drawn his service weapon?

A. Correct.

Q. It wasn't sufficient for him to have his hand on his service weapon?

A. That I saw.

[129] Q. He hadn't deployed any other weapons or tools available to him such as a, is it a PR-24?

A. Yes.

Q. That is like a baton, right?

A. It is an expandable baton.

Q. And no OC spray out, nothing like that?

A. No.

Q. And when you saw him that first time, about how long before kicking in the door was that? It was about 3 or 4 minutes, right?

A. I believe so.

Q. And he had been there, I think you indicated, about a minute longer than you. So, he would have been talking to the man about five minutes before the door was kicked in?

A. I think so, yes.

Q. Now, as of time sequence 14:34:30, you indicated that you had no information to contradict the dispatch report that no weapons were involved. Did you obtain any information on the scene to contradict the dispatch report that there were no weapons?

A. At that time, no.

Q. Did you at that time come into the possession of any information contrary to the dispatch statement at 14:36:51 that the children had ran away from the apartment?

[130] A. No.

Q. You indicated that you repositioned. Where did you reposition to and why did you reposition?

A. I had actually repositioned just about 3 or 4 feet to my left so I could see around the corner and actually see inside the window.

Q. So, when you first arrived, you were relatively close to the building, and you couldn't see in the window. So, at some point you stepped away from the building in order to give yourself a better view?

A. Correct.

Q. Do you know—scratch that. Let me ask it this way: Would you agree that if you were on a sufficient angle to see into the window, you would have also been visible from the window?

A. Yes.

Q. Do you have any reason to believe, or do you have any knowledge that would lead you to believe that Mr. Herring saw you from the window?

A. No.

Q That was a poorly phrased question. Do you know whether he saw you?

A. No.

Q. So, he could have seen you, but he may not have seen you?

[131] A. Exactly.

Q. You don't know one way or the Other?

A. No.

Q. That is the problem with asking bad questions: You have to follow them up. What did you see when you looked in the window?

A. I saw a man later identified as Mr. Herring standing there with no clothes, a lot of blood on him.

Q. Let me ask you about that. How high up was the windowsill?

A. It was probably from the outside—

Q. From the ground?

A. A little bit above my waist probably, if I remember right.

Q. Looking through the window, what portion of his body could you see?

A. I saw probably just above his hipbones.

Q. Could you see his genitalia?

A. I did not, no.

Q. So, at the time you were looking in the window you didn't know whether he was clothed or unclothed?

A. Yeah. From down, I didn't know, because I didn't see that.

Q. So, a more accurate description of what you saw, Officer, would be that from at least the hips up he was not [132] wearing any clothes?

A. Correct.

Q. From the hips down you didn't know?

A. I didn't look.

Q. You couldn't look. You can't look through a wall, right?

A. No.

Q. And you didn't go up to the window to look any closer?

A. No.

Q. Did you have at that time a report that he was nude?

A. Just the one that came in just before the radios went out.

Q. Got it. From the time that you initially were against the building to the time that you repositioned such that you could look in the window, did you hear any verbal communication between Mr. Herring and Officer Darress?

A. I heard them talking,. but I don't remember exactly what they were saying verbatim.

Q. Would it be fair to say that you don't know exactly what was said between those two?

A. Yes.

Q. And that if I wanted to know what was said between those two, the guy I would need to talk to is Officer [133] Darress?

A. Correct.

Q. Did you form an opinion as of the time that you repositioned yourself 3 feet from the building as to whether you had—whether you were involved hi the situation that may involve the mentally ill?

A. No, I didn't form an opinion yet.

Q. When did you form that opinion?

A. Well, to be holiest with you, everything happened so fast, it was probably after the fact.

Q. So, a fair statement, Officer, is that you did not recognize this as a situation involving the mentally ill until after the conflict had occurred?

A. No, that wouldn't be fair. What would be fair is that I didn't diagnose him as mentally ill.

Q. I am not asking you to diagnose, because that is not your role as an officer. Your role as an officer as I understand it, and you correct me if I'm wrong, is to make assessments regarding whether you are dealing with the mentally ill such that you can tailor your response appropriately and in appropriate situations make determinations as to whether one needs to go into custody or to a hospital, okay?

A. Correct,

Q. Did you form an assessment, and I don't want a [134] diagnosis, but you as an officer, the guy standing there having to respond to this, okay, when did you form an assessment that you may be dealing with a mentally ill person?

A. That would have been when I was inside, and that I could actually hear what was more being said.

Q. So let's stop there and we will go forward, and when we get to that I will ask you about that: Did you have conversations with Officer Darress while he was standing 25 feet from the window?

A. No. Not no conversations.

Q. Did you have any other communication with him?

A. When he told me—when he told us to go around to the front door.

Q. How does one tell you that without talking to you?

A. Well, there wasn't a conversation. He said, "Go to the front door."

Q. Then let me make sure that I am using the right words. Can you relate to me everything Officer Darress said to you and everything you said to Officer Darress as he was standing 25 feet from the window when yob first showed up?

A. Okay. Yeah. He told me, once I repositioned myself, saw what was going on, he said, "Go to the front door and see if it is open."

Q. Did he say anything else?

[135] A. No.

Q. Did you say anything in response?

A. Nope.

Q. He said, "Go to the front door and see if it is open"?

A. Yeah. Pretty—not verbatim, but, yeah, that is what he wanted me to do.

Q. Can you tell me as near as you can what you remember him saying?

A. That is as near as I can remember.

Q. Okay. And what did you do then?

A. I went—I actually went to the corner, and Officer Ambuehl went to the front door. So I could see both Officer Ambuehl and Officer Duress.

Q. How long did that take?

A. The whole thing from Officer Ambuehl going over there, probably about 30 seconds, that I remember.

Q. So, of the 4-minute timeframe that we are talking about now until the entry was made into the apartment, 30 seconds or so, was Officer Ambuehl

positioning himself at the front door and you taking up a position such that you could see and provide assistance to both officers, if necessary?

A. Correct.

Q. So, did you have communication with Officer [136] Ambuehl at any time during this course of events?

A. When he went to the front door and he came back tc where I was standing and said it is locked.

Q. Let's back up. I asked you about getting out of the car and talking to the guy that said, "Hey, he is around the corner." What discussions did you have with Officer Ambuehl when you got out of the car?

A. I didn't. I don't remember saying anything to him. I am not saying we didn't. I just don't remember.

Q. At the time that you were initially positioned against the wall of the apartment did you have any conversations or communication with Officer Ambuehl?

A. No.

Q. At the time you repositioned yourself, did you have any communication with Officer Ambuehl?

A. Just when he came back and told me that it was locked.

Q. Got it. When Officer Darress communicated to you go see whether the front door is locked, did you then communicate to Officer Ambuehl, or did he take it upon himself to go check?.

A. He took it he just—we both went that direction and he went there first. I stopped at the corner so I could see both.

Q. Based upon your position of observation, was [137] Mr. Herring in a position to see Officer Darress relay to somebody else, go check the front door, see if it is locked?

A. Yes.

Q. Do you know one way or the other whether he recognized that other officers were going around to the front of the door?

A. I don't know.

Q. Officer Darress comes back and says the front door is locked. What happens then?

A. What happens is at that point I turned and yelled it is locked.

Q. So, at that point you called out to Officer Darress from your position at the corner, it is locked?

A. Correct.

Q. Did you try to do that surreptitiously, or did you use a loud voice?

A. No, I just said it is locked.

Q. How far were you from Mr. Herring's window?

A. At that point?

Q. At that point you said it is locked.

A. I couldn't even see his window at that point.

Q. I didn't ask you whether you could see it. I asked you how far away.

A. If I couldn't see it, I couldn't tell you how far away I was, because I can't estimate distance on something I [138] can't see.

Q. Let's break it down. At some point you were at the corner of the building when you first arrived before you repositioned yourself at the corner, right?

A. Yes.

Q. How far were you from the window when you were at the corner?

A. About 15 feet.

Q. So, you were closer to the window than was Officer Darress?

A. Correct.

Q. At the time that you called out to him, it is locked, how far were you from the position you were

at when you initially positioned yourself against the wall?

A. To the best of my recollection, I would say about 50 feet from that point.

Q. Was that 15—excuse me, 50 feet further from the corner?

A. Yes.

Q. So, if one takes 15 and 50 we have 65 feet?

A. Correct.

Q. 25 yards is about 75 feet.

A. Yes.

Q. So, at the time that you called—excuse me, the time you stated to Officer Darress it is locked. you were [139] actually closer to Mr. Herring's window than was Officer Darress?

A. It was at an angle, though, but yes. In feet, yes.

Q. Then what happened?

A. Then Officer Darress continued talking to Mr. Herring. I don't know what was said. And at that pain it was I guess about two minutes past, I am not quite sure of the exact minutes, he looked at me and said, "Kick it in." About at the same time that I had the idea.

Q. As of that time, did you have any information to contradict the report of 1534:30 indicating no weapons?

A. No.

Q. At that point did you have any information to contradict the 15:36:51 report that the children had left the apartment?

A. No:

Q. Tell me what affirmative information you received in addition to that given to you as of 14:41:22.

A. What do you mean affirmative? Like what I observed, or—

Q. Observations or one informational source.

A. At that point I observed a lot of blood on him. And items being thrown. But I. still hadn't heard anything on the radio. So, I didn't get anything verbally.

[140] Q. So, the information that you had available to you was that conveyed prior to 14:41:22, plus your personal observation that items had been thrown out of the apartment; that Officer Darress was beyond the area where the items had been thrown; that a man, as far as you could see, was nude from at least the hips up; and you had a report that he was entirely nude; and that he was bleeding?

A. No. I didn't know if he was bleeding. I just said 1 saw a lot of blood on him.

Q. Thank you. The time index of 14:41:22 indicated bleeding arms. Was that consistent with your observation?

A. I didn't see any injuries. I couldn't see the injuries on his arms, but there was a lot of blood on them.

Q. And you didn't hear any conversation at that point between Officer Darress and Mr. Herring that you can recall?

A. No.

Q. Who made the, decision to kick in the door?

A. Officer Darress verbally told me to kick in the door.

Q. At that point had anybody in a supervisory capacity been called?

A. I didn't call anybody.

Q. Did you observe Officer Darress call anybody?

A. Not that I saw.

Q. Did you observe Officer Ambuehl call anybody?

[141] A. Not that I saw.

Q. Do you know if any other officers were present at the scene?

A. At that point, no, I don't know of anybody else.

Q. Who kicked the door in?

A. Officer Ambuehl kicked it first twice, and then it didn't open all the way, and I did the last third kick.

Q. And is that when the jamb broke?

A. I believe so. I don't remember exactly how it went in.

Q. What caused you to go into the apartment?

A. You want my personal, what caused me to go in the apartment?

Q. Well, all right. Let me back up, because that is a good question. I assume that one of the reasons that you kicked in the door and entered the apartment is that you were requested by another officer to do so, correct?

A. Correct.

Q. Was he in a position of supervisor vis-a-vis he would give you instructions and you would be expected to comply by the way of his chain of command?

A. Yes.

Q. I assume that chain of command was one reason that you followed those instructions, right?

A. Yes.

[142] Q. And also, Officer, based on my experience, when you are in a situation and an officer makes a request, you usually don't second-guess that other officer; you do what the officer is requesting, right?

A. That's correct.

Q. And that was part of your assessment and decision-making process in kicking in the door, right?

A. Correct.

Q. And then you had indicated just kind of as an aside, I believe, and correct me if I'm wrong, that you had other personal reasons in addition to that, right?

A. Yes.

Q. What were those reasons?

A. The observation of the blood on him. I was unaware if it was coming from him or someone else in the apartment.

Q. You had no affirmative information there was anybody else in the apartment?

A. No.

Q. And the last report that you received as of 14:41:22 is that he was bleeding 'from his arms?

A. I don't actually remember hearing bleeding from the arms at that point. Like I said, I saw the blood on him. But I didn't see the injuries.

Q. The report at 14:41:22 was, "Suspect Greg is now [143] nude in Greg's apartment with bleeding arms." That is the last time index that you indicated that you recall. But you don't recall the bleeding arms?

A. I don't really recall whether—where the blood was coming from.

Q. Would you agree that had you heard the dispatch with bleeding arms, that would have given you some information as to where the blood was coming from?

A. Where some of the blood was coming from.

Q. And, again, there is a later call at 14:42:41 which due to the dead spot it sounds like you didn't get, indicated bleeding from an abdominal area.

A. Yeah. I never got that.

Q. And, again, if that was information that would have been made available to you, it is information that yo could have considered?

A. Yes. It would have been considered, yes.

Q. When you leave your cars, do you still have asses to the dispatch radio communications?

A. Usually.

Q. In this situation, did you?

A. Not that I remember.

Q. Is the apartment complex located such that you cannot receive radio communication while you are in the complex?

[144] A. It just has dead spots.

Q. Do you recall whether the area surrounding Mr. Herring's apartment was a dead spot?

A. I couldn't hear any radio communications. I was assuming it was.

Q. Did you have any other information at the time that you kicked in the door that you have not related to me?

A. No.

Q. And aside from the bleeding, do you have any other reason and, of course, the communications from Officer Darress, that caused you to kick in that door?

A. No.

Q. Tell me what happened when you kicked in the door.

A. Once We kicked in the door, we went in there, kind of looking in all the rooms as we were going.

Q. And that is standard police procedure, correct?

A. Looking for anybody who may be down.

Q. Or anybody who would pose a threat to officer safety?

A. Correct. But you also have to go to the threat first.

Q. Now, if I may interrupt you. Whatever conversation had occurred between Officer Darress and Mr. Herring in that 4 minutes before the door was kicked in, that communication, the content of that communication was [145] not told to you?

A. Correct.

Q. Whatever communication occurred during that period of time, as far as you know, was never relayed to a superior?

A. As far as I know, yes.

Q. And as far as you know, no one in a supervisory capacity was called as they would be in a barricade situation?

A. As far as I know.

Q. Does this constitute a barricade situation?

A. No.

Q. The differences are you could actually see Mr. Herring, correct?

A. It was in progress. Correct.

Q. And an officer was actually speaking with Mr. Herring, correct?

A. Correct.

Q. And that as we discussed earlier, that one of the things that you want to facilitate when you arrive on a scene is communication between a suspect or person being contacted and officers, right?

A. Correct.

Q. Did Mr. Herring at any time that you could observe prior to kicking in the door break off communication with [146] Officer Darress?

A. Not that I could observe.

Q. Other than throwing things out the window, did you observe—again, this is prior to kicking in the door, did you observe Mr. Herring take any other actions?

A. No.

Q. From your vantage point when you repositioned, you couldn't see anybody else in the apartment, right?

A. Not in that room.

Q. From what you could see of the apartment—I understand you can't see through walls, but what you could see there was nobody else in there, right?

A. From what I could see, there was nobody else.

Q. From what you could see, you outnumbered Mr. Herring, right?

A. At that point.

Q. And from what you could see, Mr. Herring wasn't trying to flee the apartment?

A. Not what I could see, no.

Q. From what you could see, Mr. Herring wasn't making any efforts to destroy any evidence or contraband, correct?

A. Well, he was smashing things up and throwing things, so—

Q. All right.

A. What he could have been destroying could have been [147] evidence.

Q. You had no reason to believe that?

A. No.

Q. You are just guessing or using supposition now, right?

A. I am saying when you are destroying something, you know.

Q. It didn't appear to you to be intentionally destroying like you would flush a bag of drugs down the toilet?

A. No.

Q. This was a man who was just destroying inanimate objects, right?

A. Correct.

Q. And aside from himself you had no affirmative information that anybody else had been hurt?

A. I had no information to either contrary or affirmative.

Q. That's right. So, no information either way. Right?

A. Correct.

Q. And although you could see blood on Mr. Herring, you did not know the nature or extent of his injuries?

A. Or if it was from him, yes, correct.

Q. And unfortunately you didn't have access to the [148] radio communications indicating that he was bleeding from his arms and from his stomach area?

A. Correct.

Q. And your observations of Mr. Herring weren't sufficient to allow you to make those observations?

A. Correct.

Q. What happened when you all kicked in the door?

A. As I said, we walked—kind of went down the hall, looking in rooms as we went.

Q. Weapons drawn?

A. No. At that point, no. Went around the corner to the bedroom that Mr. Herring was in. He was still talking to Officer Darress through the window. And at that point I saw that Officer Darress appeared to have moved up towards the window.

Q. How close was Officer Darress to the window?

A. I could not see because of the distortion of the window, but probably about 20 feet by then.

Q. So whatever the threat was posed by Mr. Herring, it wasn't sufficient for Officer Darress to back up; he was actually coming forward?

A. I have no clue why he moved towards the window. You would have to ask him.

Q. Got it. I will do that.

A. I took up a position by the bathroom in the [149] bedroom. Officer Ambuehl was behind me.

Q. I have seen diagrams of the scene drawn by Officer Darress and Officer Ambuehl, and I didn't see one drawn by you. Have you drawn one?

A. No, I haven't drawn a diagram.

Q. So, when you were interviewed by Ms. Dix, you didn't draw one?

A. No.

Q. So, you take up a position and Officer Ambuehl is behind you.

A. Correct.

Q. And then what happens?

A. It was at that point Mr. Herring turned and faced us.

Q. How long from the time you entered the apartment to the time that he turned to face you?

A. 30, 40 seconds.

Q. So, you kicked the door in, you go in, you are checking out the rooms as you go for officer safety reasons and to make sure nobody else is in there. And then you take up a position with Officer Ambuehl behind you. Mr. Herring sees you.

A. Correct.

Q. Brief period of time, right?

A. Correct.

[150] Q. Then what happened when officer—excuse me, when Mr. Herring sees you?

A. He threw something at me. I don't remember what it was. He had something in his hand, threw it at me. Missed. He picked something else up. At that point Officer Darress through the other side of the window said, "Spray him."

Q. Okay. So, it was Officer Darress' decision to deploy OC spray?

A. I was pulling it out of my holster at the same time. He probably saw us pulling it out, and he mouthed, "Spray him."

Q. How long did you have an opportunity to observe Mr. Herring before pulling out your OC?

A. 20 seconds. As of when he turned around and started throwing things.

Q. Would you agree that—again, this is hindsight, and hindsight is 20/20. Let me ask a general question. Somebody is suffering an acute mental health episode. Kicking in the door isn't deescalating the conflict, right?

A. Correct.

Q. What attempts did you make to deescalate the conflict before kicking in that door?

A. I didn't make any. I wasn't talking to him.

Q. And whatever efforts were made by Officer Darress [151] to deescalate the conflict, those occurred in approximately a 4-minute period of time?

A. Correct.

Q. And whatever efforts to deescalate the conflict during that 4 minutes of time, to the best of your knowledge, they did not include contacting supervisory personnel?

A. To the best of my knowledge.

Q. Do you have any training in hostage negotiation?

A. No.

Q. Do you know whether Officer Darress does?

A. I do not know.

Q. You have received training regarding OC sprays, right?

A. Correct.

Q. And you received training regarding the mentally ill, correct?

A. Correct.

Q. Shouldn't use OC sprays on the mentally ill, should you?

A. Why?

Q. You have not been trained—have you been trained specifically regarding the use of OC sprays on the mentally ill?

A. Just OC spray on use of people, period. It has [152] nothing to do with mentally ill.

Q. So, you have received no training on the use of OC sprays in relation to the mentally ill?

A. No.

Q. Okay.

A. I don't believe that is what you asked.

Q. Let me make sure I ask it, Officer, because I don't want to trip you up. What I am trying to confirm is that you have received no training regarding the appropriateness or inappropriateness of the use of OC sprays on the mentally ill?

A. No.

Q. You have received no training on how mentally DI persons will react differently than a normative population when sprayed with OC sprays?

A. We were never told they would act differently.

Q. That has not been a part of your training at all?

A. No.

Q. Have you been given any manufacturer's written information regarding populations that it is appropriate and inappropriate to use OC sprays on?

A. No.

Q. Have you given any manufacturer's information on OC sprays?

A. On OC sprays. Yes.

[153] Q. What have you been given on OC sprays?

A. Just training through the Academy and the pamphlets and the books that we had, and we go through OC training every other year and get recertified.

Q. None of that deals with the mentally ill?

A. No.
Q. Did you actually pull out your OC spray?
A. Yes.
Q. Did you actually spray Mr. Herring?
A. Yes.
Q. Did Officer Ambuehl pull out his OC spray?
A. No.
Q. So, he never sprayed Mr. Herring?
A. No.
Q. Did you spray Officer Ambuehl?
A. No.
Q. And the reason why I am asking is there is a report by another officer wherein describing Officer Ambuehl he indicates that he thought he was sprayed by OC spray.
A. No. It might have been once we were wrestling he got residue on his hand or something. That is how you can get residue that way. If you touch a face or anything happens, you can get the residual part of it. But he was behind me, so he couldn't have gotten sprayed.
Q. Did you during the melee, and I know this is [154] later—and let's not use "melee." During the physical conflict with Mr. Herring, did you strike Officer Darress?
A. No.
Q. Did Officer Darress strike you?
A. No.
Q. There are reports indicating that that occurred. And again, it doesn't sound like it was an intentional kind of thing, but it was in the course of the conflict.
A. No. I never struck him. He never struck me.
Q. Did Officer Ambuehl strike you or did you strike Officer Ambuehl?
A. No.

Q. Did Officer Ambuehl strike Officer Darress or did Officer Darress strike Officer Ambuehl?

A. Not that I saw.

Q. Would you agree that spraying someone with OC spray is not deescalating the conflict?

A. No.

Q. You would not agree with that statement?

A. No. Because the training is OC usually does bring them down to where they can be handled and taken into custody without further incident.

Q. Have you received training on anyone that it is not appropriate to use OC sprays on?

A. No.

[155] Q. How did Mr. Herring react to the OC spray?

A. He turned away for about a second, looked back at me with his eyes wide open and said something to the effect that, "Now we are all going to die." And that is when he charged me.

Q. And then what happened?

A. He tackled me. We kind of both went down to the bathroom and slammed the door shut between one and Ambuehl.

Q. Let me back you up. He didn't charge until after the QC spray had been deployed?

A. Correct.

Q. And up until that point the only aggressive act taken by him toward you was he threw an object at you?

A. A couple of objects, yeah.

Q. Didn't hit you with either of the objects?

A. No.

Q. At that point, you had already—and by that point, I mean by the time you deployed OC spray, you had already been through the apartment and you could see there was nobody else in there, right?

A. I saw the rooms we could actually see. There were two rooms that we couldn't look in—that we didn't get to yet.

Q. But at least for the two rooms that you have looked in, you could see that there was nobody there, [156] correct?

A. That we could see, yes.

Q. And he never charged any officer and engaged in hand-to-hand physical confrontation until after he was OC'd?

A. Correct,

Q. How far away from you was he when you OC'd him?

A. About 7 feet.

Q. And lie was not moving toward you until about a second after he was OC'd?

A. Correct.

Q. And at that point he came towards you?

A. Yeah. He ran towards me.

Q. At that point he was not armed?

A. That I saw.

Q. And he was nude?

A. Correct.

Q. No place to hide a weapon when you are nude?

A. There are a lot of weapons around you could pick up on the way.

Q. I wasn't asking you that, Officer. I am asking you, there is no way to hide a weapon on yourself when you are nude?

A. No.

Q. And you at that point had no information to contradict the prior time index that he had no weapon?

[157] A. Correct.

Q. And that there were objects between you and Mr. Herring that could be used as weapons, correct?

A. Correct.

Q. But at least up until the time that you deployed your OC spray, with the exception of throwing two objects at you, he didn't pick up anything that you would consider to be a deadly weapon?

A. No.

Q. He was outnumbered by police officers?

A. At what point?

Q. WeIl, at the point you entered the apartment.

A. Okay. Because when he tackled me it was just me and him for like 30 seconds to a minute.

Q. Okay. I see what you are saying. So let me back up and let me make sure that this is clear. When you entered the apartment, it was you and Officer Ambuehl?

A. Correct.

Q. Officer Ambuehl was behind you and was in the apartment?

A. Correct.

Q. Officer Darress was outside of the apartment approximately 6 feet from the window?

A. About 20 feet I think at that point.

Q. Thank you. I may have misremembered, Officer. I [158] am not trying to trip you up. So, at that point, with you and Officer Ambuehl in the apartment, there were more police officers in the apartment than there was Mr. Herring?

A. At that point.

Q. And when you look at both officers on scene immediately outside the apartment and inside the apartment, there were more officers on scene and outside the apartment than there were in the apartment, correct?

A. Yes.

Q. How close to you was Officer Ambuehl at the time you deployed your OC spray?

A. I don't know. He was behind me. The door was about 4 feet behind me. So, that is—he had to be at least 4 feet behind me.

Q. 4 feet plus?

A. Yes.

Q. And then you and Officer Ambuehl were not separated by any door at the time that you deployed your OC spray?

A. Correct.

Q. At the time that you deployed your OC spray, then, without separation, there were at least two officers, and if you include the outside wall as a separation, there was another officer right on the outside of that wall?

A. Correct.

[159] Q. And at the time you deployed your OC spray he wasn't attempting to flee, right?

A. No. He was coming towards me.

Q. Well, you said he didn't come toward you until you deployed the spray?

A. You said at the time you sprayed your OC—at the time you deployed your OC.

Q. Let me make sure I understand. I understand that you deployed your OC, he flinched, for a second, and then charged, correct?

A. Correct

Q. Did you deploy it in a burst or a stream?

A. Burst. One-second burst.

Q. And at the time you deployed it, there was no other person in the room with Mr. Herring?

A. Correct

Q. And at the time you deployed it, in each of the rooms that you have already looked in, understanding there were some rooms that you didn't, there was nobody in those rooms?

A. That we saw, correct

Q. You deploy your OC spray, he charges toward you, then what happens?

A. At the time he reached me, we kind of backed up and hit the door to the bedroom and it slammed shut.

[160] Q. Were you in a hallway?

A. The bedroom is kind of like, I don't know how to explain it, there is a small hallway in between from the bathroom to the main door. Like just big enough to the size of the bathroom door.

Q. Okay.

A. At that point I tried to control the situation going down, but I wasn't in control. He—we both kind of twisted and turned and fell into the bathroom. And it was just me and him in this little bathroom.

Q. How tall are you, officer?

A. 5, 8.

Q. And how much do you weigh?

A. At that point—at that time or now?

Q. At that time.

A. 199.

Q. You look like a fairly athletic person. Are you an athlete?

A. No.

Q. You had mentioned working with the Navy SEALS. Were you a SEAL?

A. No. I was their taxi.

Q. Got it. My dad patched holes in SEALS for a living. Then what happened?

A. At that time we both fell into the bathroom. He [161] fell face down. I fell on my side right next to him. He tried to get up. He grabbed my testicles and squeezed really hard. I think at that point is when the other officers could hear me screaming, yelling at him let go. As he tried to get up, I tried to keep him

down. Then the other officers were finally able to get into the room and assist me.

Q. Now, from the time that you entered the apartment to the time that you deployed your OC spray, describe to me all observations you made of Mr. Herring.

A. Him personally?

Q. Yes. Him personally.

A. That he was nude and making some—some irrational comments.

Q. What irrational comments was he making?

A. That he was—at that point he did say he was God and we were all going to die. And then when he looked at me and said we are all going to die and charged me.

Q. That is when you—okay. Would you agree, sir, that Mr. Herring was exhibiting bizarre behavior?

A. Yes.

Q. And we bad talked earlier about the different indications of somebody suffering either a psychosis or a bipolar episode. Would you agree that based upon your observations at that time, at least in your estimation, [162] Mr. Herring was suffering from some type of mental illness

A. Yes.

Q. And you made that assessment prior to the deployment of your OC spray?

A. Correct.

Q. Did you make it prior to your entry into the apartment?

A. I hadn't, no.

Q. Do you know whether another officer had?

A. I can't speak for them.

Q. Did any officer make a comment to you prior to kicking in the door, hey, this guy is nuts, anything like that?

A. Not that I remember. I don't remember those words.

Q. And as professional police officers, you may have used different words that weren't as flippant. And I am not trying to restrict the words by that question.

A. Correct.

Q. So, no one made any statements to you to the effect that he was somehow suffering a mental illness?

A. Not that I remember.

Q. All right He charged you. When he hit you, the door closed. You go down as part of that physical conflict. He grabbed your testicles. You cried out. Other officers [163] entered the room; is that correct?

A. Yes.

Q. Tell me what happened then.

A. At that point I am trying to get back up so I can have the, I guess, you call the upper hand or be above him. He is trying to get up, screaming. I remember Officer Darress coming up alongside me, and I believe Ambuehl was down by the—his feet. And at that point we just tried for about 15 minutes to get him in handcuffs and get him under control. I remember—I do remember Darress yelling for medical to come in because we needed more people.

Q. Do you recall when the call for medical was made?

A. Not the exact time. Not without looking at it. It is 14:53:11.

Q. That would have been 3 minutes after the conflict?

A. No. At that time when he said we need more people and medical inside, that is when we are still fighting him.

Q. Let me back up because I want to make sure I have the timing right. 14:50:39 you kick the door?

A. Correct

Q. 14:53:11 you call for more medical?

A. Correct.

Q. Excuse me, you call for medical. That is about 3 minutes?

A. About—

[164] Q. Two and a half minutes?

A. About 3.

Q. And then from the time that you kick in the door to the time the call comes in that suspect deceased, is 16 minutes, correct?

A. Correct.

Q. The call suspect deceased wasn't made at the scene, was it?

A. Yes. Yes, it was.

Q. Is it typical to identify a suspect is deceased when life-saving measures were still occurring?

A. You would have to ask medical that. They are the ones that call it out.

Q. What does clear code 1 mean?

A. That means you can go back to normal radio traffic.

Q. The reason why I am asking, at 15:03:52 there is a clear code 1—excuse me, it 15:03:49. Would it be fair to say that the armed conflict with Mr. Herring was under control at that point?

A. That was at least at the time that I left and got out of there, and other officers were there.

Q. So, again, I know the timeframe when you are in the middle of something seemed different, but what you are really talking about is a 13-minute period of time from the [165] time that the doorway is kicked until the time that the—excuse me, a 13-

minute period of time from the time when the code 1 is cleared. So, that is 13 minutes total.

A. Okay.

Q. And of that time, not all of it was spent in conflict with Mr. Herring, because you took those other actions first, right?

A. Right.

Q. Did you strike Mr. Herring with your fists?

A. Yes.

Q. Where did you strike him? What type of fist did you use? And how many times?

A. I don't think I could tell you exactly how many times without going over my report and all of that stuff, because it has been two and a half years. I do remember did do some hammer strikes to the back in between his shoulder blades. When he bit my finger I did punch him in the face a couple of times until he let go. And then that is actually the only ways I hit him was hammer strike or fist straight down when he bit my finger.

Q. Did any officer deploy their PR-24?

A. I actually deployed mine and attempted to use a pry hold to get his arm behind his back. And it wasn't working. So, I handed it back to Officer Ambuehl, and I remember telling him to try the cross leg.

[166] Q. Do you recall whether in your training with the mentally ill one of the officer safety issues mitigating against using physical violence and in favor of deescalation, was the danger to officers posed because the mentally ill are going to be stronger and aren't going to tire as quickly as a normal person?

A. Oh, yeah.

Q. And it is fair to say that that is exactly what happened in this case, is that as soon as physical conflict ensued, Mr. Herring was incredibly strong

and wasn't being warn down even though you have three officers on him?

A. Correct.

Q. Did an officer jump up and down on him?

A. No.

Q. So, if that is referenced in any report, that would be incorrect?

A. That would be correct. Nobody was jumping up and down on him. We were all on the floor.

Q. Did Officer Ambuehl strike him?

A. Not that I saw.

Q. Did Officer Darress strike him?

A. He did strike him a few times. I couldn't tell you how many. I was kind of concentrating on what I was doing.

Q. Why don't you go through the process of trying to [167] cuff Mr. Herring.

A. If I can remember it without my report, like I said, it has been two and a half years. I do remember I tried to—at one point I tried to put a handcuff on his left hand as he is facing down. And he, at that point, just stops, looks up at me and says, "That is not going to fit" And just looked me right in the eye. That kind of startled me in itself.

But I was actually able to get the cuff on his wrist. It only clicked once or twice. Then as I tried to pull his arm behind his back, he pulled me down into him. At that point we just struggled with him for what seemed like forever, and I think Officer Darress was finally able to get his right hand cuffed, but it was in front of him. He was still able to push off and fight. We couldn't get his hands behind his back.

Q. Did you get his legs restrained?

A. No, I did not.

Q. Did any of the officers?

A. Not that I saw.

Q. Were you present when it was reported that Mr. Herring stopped breathing?

A. No.

Q. Were you present when medical personnel arrived?

A. Yes.

[168] Q. Where was each officer and where was Mr. Herring when medical personnel arrived?

A. I was—me and Officer Darress were up at his shoulder level, and Officer Ambuehl was still at his legs, trying to control his legs.

Q. Was he cuffed at the time medical personnel arrived?

A. No. We actually had him cuffed after they arrived. They kind of stood in the doorway and watched.

Q. How many medical people arrived?

A. I don't remember.

Q. Were other officers present at that time?

A. At that time, no.

Q. At any time were there more than three officers actively engaged with Mr. Herring?

A. No.

Q. At any time since all three of you were there, was there any time that there was less than three of you?

A. No.

Q. What was said to medical when they arrived?

A. We asked them to give him Valium.

Q. Who asked that?

A. I did.

Q. Tell me exactly, the best you can recall, what you said to them.

[169] A. Since I didn't know what the heck they call it the code for it is good-night juice. I said, "Do you have good-night juice?" That is when the fire depart-

ment said, "Yeah, but you are going to have to fight him for a little while. It takes a while for it to work." I said, "As you can see, I am fighting him now," as I am trying to hold his arm behind his back.

At that point, I don't remember who administered it, but I remember seeing the needle go in. And then it was about a minute or two later I saw a second needle.

Q. Did you request a second needle?

A. No. I just—I don't know how they give Valium. I don't know if it was part of the same shot, if it was the same drug, I don't know.

Q. Did any officer request, a second needle or second round of goodnight juice, or whatever terminology would have been used?

A. No.

Q. How long between each administration?

A. About a minute, I think.

Q. Was anything said to the medical personnel by anybody other than you?

A. No. Not that I remember.

Q. Did any medical personnel assist in restraining Mr. Herring?

[170] A. No.

Q. So, any direction given to the medical personnel was given to them by you?

A. Correct.

Q. And there was no medical personnel involved in the physical restraining or physical combat with Mr. Herring?

A. Correct.

Q. It was all CSPD officers?

A. Yes.

Q. What happened after the administration of the second shot?

A. He still struggled for, I don't know exactly how long, about a minute or two, and then be finally, he stopper struggling. He was breathing, and he finally—

Q. How do you know he was breathing?

A. He calmed down. I saw him breathing.

Q. You could see what?

A. I could see his chest rising, and I could see his face. At that point, they could see that I was covered in water and blood and I was exhausted. They told me to get out.

Q. Okay.

A. I got out and went to the fire truck and sat and tried to breathe.

Q. And then what happened?

[171] A. After that, Officer Ambuehl and Officer Darress came out shortly after, and then all of a sudden AMR came running out and said he is not breathing.

Q. How long from the time of the second shot to the report that he wasn't breathing?

A. I don't know. I would say about, how long it took me to get to the truck, and 4 minutes as an estimation. I don't really recall. Because like I said, I was still kind of in that slow motion.

Q. After the report that he had stopped breathing, what occurred then?

A. At that point I don't know, because medical was in there. I was outside. I was way off scene. I was over by the fire trucks getting water and oxygen.

Q. Did you see them bring Mr. Herring out?

A. No.

Q. As of the time that you left the apartment, did. you observe Mr. Herring at any time subsequent to that?

A. After I left?

Q. Yes.

A. No.

Q. They brought Mr. Herring out at some point and placed him in an ambulance. You didn't see that?

A. I did not see that.

Q. Where were you vis-a-vis the ambulance that you [172] didn't see him?

A. I was on the other side of the fire truck that was like at the end of the parking lot.

Q. How many people were in that apartment when you left?

A. I couldn't tell you exact number. I don't know.

Q. Have you ever looked at your tape of—I think you did tell me you looked at your tape of your interview with Investigator Linda Dix?

A. Yes.

Q. Was that tape a true and accurate copy of the interview?

A. Yes.

Q. And it accurately represented what she asked you?

A. Yes.

Q. It accurately represented your response?

A. Yes.

Q. Were each of the responses given by you true and correct?

A. Yes.

Q. Did you give her any information that was untrue?

A. No.

Q. Did you try your best to be accurate and complete in giving that information?

A. Yes, I did.

[173] Q. Do you have any reason to believe in viewing the videotape that anything was edited or cut from the videotape?

A. No, I do not.

Q. Do you have any reason to believe in viewing the videotape that anything was added that you didn't say or that you didn't intend?

A. No.

Q. Is there anything upon watching the videotape that you would want to alter or amend in hindsight, knowing that it was incorrect?

A. No.

(Deposition Exhibit 6 was marked.) .

Q. Officer, that is about a four-page document. If you want to take a few minutes to review it, I will step outside with Ms. Moore and we will be right back in.

(Discussion off the record.)

Q. When was Mr. Herring handcuffed in relation to the arrival of the medical people?

A. It was actually I think while they were there that we were finally able to get both hands cuffed. Like I say, they were standing behind me, so I didn't get a look at them very well for the most part.

Q. Did you have a chance to review Exhibit No. 6?

A. I did.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and, through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort,. Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

Scheduling Attorney for the Plaintiffs:

MR. ROBERT J. FRANK, ESQ.
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& Associates, LLC
219 West Colorado Avenue, Suite 200
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(719) 329-1700
Atty. Reg. No. 19765

DEPOSITION OF BRENT AMBUEHL
September 22, 2005

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[18] general order that deals with specifically special populations.

Q. If a guy like me wanted to access that, how would I do so?

A. I am not sure if they are on the interne. I am not sure what is made available to the public.

Q. When you access them, how do you access them?

A. I access them through, in our car we have a list of general orders that we can pull up via computer. Or we can actually pull them off the internet, the CSPD internet site. I don't know if that is available to the public or not.

Q. There is a CSPD site available to the public?

A. I believe so.

Q. When you want to look at orders relating to special populations; what do you type into the computer to get those to come up?

A. I would just type in special populations.

Q. And the same with mentally ill, if I wanted to look at mentally ill?

A. The same thing. It is all covered under the same general order.

Q. When you were looking for general orders in preparation for this deposition, what did you type in; do you recall?

[19] A. I want to say special populations.

Q. Did you review any standard operating procedures?

A. No.

Q. Did you review any reports?

A. No.

Q. Did you review any depositions previously taken in this case?

A. No.

Q. Did you look at your interview tape?

A. Yes.

Q. When did you look at the interview tape?

A. Approximately two weeks ago.

Q. When looking at the interview tape, did you also look at Investigator Dix—her summary of that interview?

A. No.

Q. Did you look at any training materials?

A. No.

Q. Did you speak with anyone aside from your lawyers relating to this deposition?

A. No.

Q. I had the opportunity to depose Chief Velez. Has he spoken with you regarding this matter?

A. Just the only tune lie spoke to me was when I was on my three days off after the incident, he called just to see how things were going. haven't spoken to him since.

[20] Q. And yesterday I had the privilege of deposing Officer Carroll. Have you spoken with Officer Carroll about this incident?

A. No.

Q. Have you spoken with Officer Darress about this incident?

A. No.

Q. Have you reviewed any material that was represented to you as being introduced as any exhibit in any prior deposition?

A. No.

Q. Thank you. Now let's get back to your training. In your 22-week training program, I can't remember whether have asked this or not, did you receive training relating to dealing with special populations?

A. Yes.

Q. Did you receive training specifically relating to dealing with the mentally ill?

A. I believe so.

Q. Do you recall how many hours of training you had relating to special populations?

A. I don't.

Q. Do you recall how many hours of training you had relating to the mentally ill?

A. No.

(Deposition Exhibit 1 was marked.)

Q. Officer, can you identify what has been labeled as Exhibit No. 1?

A. It appears to be an agenda for the 43rd recruit class, my class.

Q. And do you recognize this document?

A. Yes, I do.

Q. And does this appear to be, if you kind of take a look at it, does it appear to be a complete and accurate copy of your training program?

A. Yes, it does.

Q. If you take a look at week 11 and 10, the Bates stamp number on the bottom is 001172. It might help you.

A. Week .10 and 11?

Q. Yes, sir.

A. Okay.

Q. If you take a look at Monday, it appears as though there was four hours of training relating to interacting with special populations. Do you see that?

A. No, I don't. I am on week 10 and 11.

Q. What is the Bates stamp number on the bottom there?

A. 6-26-02. It is actually week 11-10. It is numbered incorrectly.

Q. I understand. Got it.

[22] A. I am on the right page now.

Q. If you take a look at Monday morning.

A. Correct.

Q. And I see interacting with special populations, it looks like You received four hours of training?

A. Yes.

Q. Do you recall getting any training other than that four hours of training as it relates to dealing with the mentally ill?

A. Not formal. I would say in the form of scenarios.

Q. Tell me the distinction between the two.

A. Formal training, sitting in a classroom, going over material. Scenarios are actually more putting it to use, OJT, on-the-job training type of training.

Q. I have heard what are referred to as red man scenarios.

A. Correct.

Q. Is that what you were referring to?

A. No.

Q. So, you believe you had four hours of in-classroom training, correct?

A. Correct

Q. And then you had some on-the-job training. Was that while you were at the Academy, or was that subsequent to the Academy?

[23] A. That was all at the Academy.

Q. What kind of on-the-job training did you receive as it related to the mentally ill at the Academy in addition to the four hours?

A. I can rephrase that. It is really not on-the-job training, it is more of a practical type of exercise. So, that would have been what I am referring to. Practical meaning in a scenario, they have certain scenarios set up and they evaluate how we deal with those scenarios.

Q. Okay. Can you give me a description of some of the scenarios that you dealt with as it relates to the mentally ill?

A. I can't recall a specific mentally ill.

Q. Do you recall having any training in situations where there was a mentally ill person who was acting in a potentially aggressive or violent fashion and you needed to respond to that?

A. No.

(Deposition Exhibit 2 was marked.)

Q. Can you identify for me what Exhibit No. 2 is?

A. It appears to be my training records.

Q. And it looks like these training records go back to February of 2003; is that correct?

A. Yes.

Q. I don't see anything on this training—first of [24] all, what training does this represent?

A. This is training outside of the Academy that is taken on your own, or this also reflects the in-service training we have for our quarterly qualifications for handguns, shotguns, less lethal weapons. This is

actually—and it also reflects elective training that have taken.

Q. Is it a fair statement that Exhibit No 2 is a reflection of all classes or all training that you have received since the Academy?

A. Yes.

Q. Looking at this document, I didn't find anything that readily appeared to me to be any kind of training relating to interaction with the mentally ill before May of 2003. Is that a correct statement?

A. Correct.

Q. And it appears as if in June of 2004, you had 40 hours of class time on crisis intervention team training; is that correct?

A. That would have been May of 2004. Is that what you are referring to?

Q. Actually mine—

A. I'm sorry. Yes, you are correct. June 2004.

Q. June 14, 2004, is an entry I am looking at, Officer.

[25] A. Correct. Yes, sir.

Q. Now, what was that training about?

A. That training dealt with identifying signs of mental illness, suicidal parties.

Q. Why did you take that class?

A. It interested me.

Q. Why did it interest you?

A. It was another avenue of learning how to deal with people.

Q. Before June 14th of 2004, did you have any training regarding dealing with the mentally ill since the Academy?

A. No.

Q. Who was your instructor in the CIT program?

A. There were numerous. But it was run by Fountain Police Department.

Q. How many folks took that class?

A. The initial class, 25.

Q. That suggests to me there are subsequent classes. Have you been in any subsequent classes?

A. Specifically to crisis intervention?

Q. Yes, sir.

A. No.

Q. Is this the only crisis intervention team training that you have had?

* * * *

[30] A. I can't recall who it was.

Q. Do you know the criteria which was used to select which officers took the program?

A. No, I don't. I would say that probably based on our performance, but I am not sure.

Q. And this is a follow-up to that, Do you specifically know why you were chosen to do the training program?

A. No.

Q. Tell me how you recognize when somebody is bipolar.

A. Based on my training, I can tell just by their actions. I think it is difficult sometimes to delineate if somebody is bipolar or if they are going through possibly a drug a drug situation. Bipolars are extremely, if they are in the manic phase, they are extremely strong. If they are in the depressant phase, they can be very, very depressed.

Q. Aggressive behavior is a hallmark of bipolar?

A. I wouldn't say—I wouldn't say that that is—that is a generic term.

Q. Let me ask it a little bit more detailed. Do you agree that in the manic phase of a bipolar disorder, a person may exhibit hyperactivity?

A. Yes.

[31] Q. A person may exhibit explosive temper?

A. Yes.

Q. A person may exhibit impaired judgment?

A. In the manic phase, is that what we are discussing?

Q. That is what we are discussing.

A. Yes.

Q. A person may experience accelerated thinking and speaking?

A. Yes.

Q. A person may exhibit aggressive behavior?

A. Yes.

Q. A person may experience grandiose notions? They think they are Napoleon or God or some such thing?

A. I believe that is more of a schizophrenic.

Q. A person may suffer delusions?

A. That is—based on my training, that would be more down the lines of schizophrenia.

Q. Let's talk about, then, schizophrenia. What do you believe to be the indicative factors of schizophrenia?

A. People talking to themselves, they are hearing voices in their head, unrational thinking due to that. Possibly irrational, possibly could turn violent due to the voices that they are hearing in their head.

Q. Is your answer complete?

[32] A. Yes.

Q. How about delusion, what are hallmarks of delusion?

A. Seeing things, talking not to you, but possibly to a voice that they might be hearing in their head.

Q. Is your answer complete?

A. Yes.

Q. What things do you consider as a police officer—let me back up. Would you agree that you as

a police officer, one of the assessments that you need to make when you are in a situation contacting a suspect, and that suspect is exhibiting abnormal behavior, one of the determinations you need to make is whether the person may be suffering from a mental health crisis?

A. Yes.

Q. And you would agree that unfortunately law , enforcement officers are oftentimes first responders when it comes to the mentally ill?

A. Yes.

Q. Tell me your assessment process when you arrive on a scene and you note abnormal behavior.

A. No. 1 is officer safety. When I am assessing somebody, I am always keeping my distance. I try to—I try to determine whether the person I am talking to is impaired either by drugs, alcohol, or- if I am dealing with a [33] mentally ill person.

Q. You agree, sir, that if you don't know, you are required to assume that the person is mentally ill?

A. Can you rephrase that?

Q. Sure. If you respond on a scene and someone is acting abnormally, and you don't know whether they are suffering from a mental health crisis or a crisis induced by some kind of substance abuse, you assume it is a mental health crisis, correct?

A. No.

Q. Tell me why that statement is incorrect.

A. That is done specifically based on your job—on the time you have on the street. So, the more people you deal with, for example, the better—the better judgment that you can make in terms of mental illness or impaired by drugs, for example. I don't believe that every person we deal with is mentally ill. Or address each person as having a mental illness, I should say.

Q. If you arrive at a situation, the person is acting abnormal, and you don't know whether they are on drugs or whether they are somebody suffering an illness, what do you assume?

A. I would say based on my experience on the streets, I would assume I never rule out mental illness. For example, I don't always say this guy is under the influence [34] of methamphetamines. Mental illness is always in my head when I am dealing with somebody like that.

Q. What percent, if you can give me a ballpark, of the people that you contact in your job are mentally ill?

A. I can't give a percentage.

Q. Another officer in this case has given a figure of 15 percent as a ballpark. Does that sound reasonable based upon your experience on the street? Does it seem high; does it seem low?

A. That sounds reasonable.

Q. And I heard another statistic that there are literally tens of thousands of mentally ill in the City of Colorado Springs. I think the number was 50,000. Does that again sound reasonable based upon your understanding and work on the streets?

A. It sounds reasonable, but I don't know the numbers.

Q. Did you have any training in your CIT program regarding the number of contacts that you could expect to have with the mentally ill?

A. No.

Q. Did you have any training during your CIT program regarding the percentage of the population generally that is suffering a mental illness?

A. Not that I can recall.

[35] Q. And did you have any such training prior to your CIT program?

A. No.

Q. And by that I meant any training regarding the numbers suffering mental illness or the number you may contact as a law enforcement officer?

A. No.

Q. When you approach. somebody and believe they may be suffering a bipolar disorder, what is the proper way to handle that situation?

A. When I approach it, and every officer is different, when I approach it I first find out what phase they might be in, whether they are in a manic phase or a depressed phase. I then try to determine if there is any medication involved, and if they are current on their medication.

Finally I will try to determine if there is a mental health or a family member that we can contact based on that party being cooperative.

Q. Is your answer complete?

A. My answer is complete.

Q. Bow about if you approach somebody who you determine may be suffering from a schizophrenia?

A. Personally, I take that—I deal with that a little bit differently in terms of officer safety. But I [36] will try to do the same thing. You talk in a calm demeanor, you speak to them not in a threatening way, you talk to them and see if there is anything we can do to help. If time is on our side, we will obviously attempt to get a mental health party or a family member involved.

Q. And if a person is suffering from delusion?

A. Same way.

Q. In what ways do you handle things—in what ways do you handle contact with the mentally ill different now than you did prior to the CIT program?

A. I would say in no way, I am just more educated based on the CIT training of identifying the signs and what people are going through, and the medications that are associated with their certain mental illness.

Q. Is it a fair statement, Officer, that what the CIT training program has allowed you to do is to identify circumstances 'dealing with the mentally ill better; and, therefore, tailor your response to that population in a better way?

A. I would say yes.

Q. So, it would also be a fair statement, sir, that after the CIT training program, you are a better officer responding in those situations than you were prior to that training program?

A. No.

[37] Q. One of the things I generally discuss with police officers when I am deposing them is the tools that you bring to your trade. And as a police officer, you have your badge, which is a tool, you have your uniform, which is a tool, you have your firearm, your PR-24. All of those are tools. But most officers will agree that the most valuable tool a law enforcement officer has is their training and their ability to make assessments and judgments based on that training. Would you agree that's true?

A. I would agree with that. I would also further that by stating based on your communication with people. 95 percent of this job is dealing with people.

Q. And part of what you receive as an officer is training on how to communicate with people?

A. Yes.

Q. And to the extent that you continue to take training, you become better at communicating with people, right?

A. True. Yes.

Q. And the CIT program was a program specifically designed to assist you in communicating with and making appropriate responses as it relates to the mentally ill?

A. Yes.

Q. What did you learn in the CIT program that you didn't know before the CIT program?

[38] A. I learned more of the signs that people exhibit, and I learned the medications that are associated—I can't tell you every medication that is associated with mental illness, but now I know some of the names.

Q. Did you receive information on communicating with the mentally ill in the CIT program?

A. Yes.

Q. Did you receive information as it relates to when and when not to take aggressive approaches with the mentally ill in the CIT program?

A. Yes.

Q. Did you receive any information on the use of OC sprays as it relates to the mentally ill in the CIT program?

A. No.

Q. How do you handle a person who is dealing with suicidal ideation?

A. That is a very broad question.

Q. Let me break it down, then. One of the assessments you need to make when you arrive at a scene is whether somebody is suicidal, correct?

A. Yes. Depending on the scene.

Q. How do you make that assessment at the appropriate scene? Obviously if you are responding to a 7-Eleven robbery you are not necessarily dealing with a suicide.

A. Okay.

[39] Q. But there are circumstances where you will, correct, sir?

A. Yes.

Q. When you are faced with those situations, tell me your assessment process.

A. I ask.

Q. What do you ask?

A. I ask, "Do you feel like hurting yourself?"

Q. If they tell you yes, what do you do?

A. If there is not a weapon involved, we call medical and have them come out. We try to calm the person the best we can to make sure that they are safe.

Q. Would you agree when dealing with a mentally ill population, deescalation is a very, very important aspect of -policing?

A. Yes, I would.

Q. And would you agree that it is an officer's obligation to attempt to deescalate a circumstance prior to engaging in the use of force?

A. Should attempt to deescalate every situation, yes.

Q. When do you call a superior officer to the scene?

A. In terms of—

Q. Well, and I'm sorry, Officer, I am asking you a lot of generalities and I need to make them more specific. From time to time when you come onto a scene do you attempt [40] to contact an officer with more experience or more training to assist you in relation to that scene?

A. I try to work through it the bet I can, but if I have questions, I will always call somebody more veteran to me.

Q. On what occasions do you do that?

A. If I am trying to make a decision on whether I take a case support, or depending on what I have On these types of situations, or issues that I haven't been involved with.

Q. When in dealing with the mentally ill is it appropriate for you to contact a supervisor?

A. Once again, that is a very broad question.

Q. Are you capable of answering the question the way it is phrased?

A. No, I am not.

Q. Okay. Fair enough. That is one of those things, Officer, if I ask you something you can't answer because of the way I ask it, you just tell me.

A. Okay.

Q. Have you ever called a superior officer to a scene involving mental illness?

A. Prior—prior to this incident, no. And I didn't actually call a supervisor on this, it was just monitored.

Q. Subsequent to this incident have you?

[41] A. When dealing with mental illness?

Q. Yes.

A. Yes.

Q. On how many occasions?

A. Probably one that I can recall.

Q. And could you describe that occasion for me?

A. The party was suicidal on the telephone stating he wanted to hurt himself and was asking for help. And the only reason I called a supervisor out was trying to determine where we could take him to get him that help.

Q. As an officer with CIT training, are you called by other officers to assist in situations involving the mentally ill?

A. At times.

Q. How often since your CIT training have you been called upon in that capacity?

A. I can recall twice.

Q. Prior to your CIT training, was there a person available for you to call should you need help dealing with the mentally ill?

A. Just all that I knew of were the veteran officers that had been out and dealt with these situations more than I.

Q. Do you know when CIT training was first made available to CSPD officers?

[42] A. I know that I was in the first class that was made available. So, I would have to say June of—whenever that date was on there.

(Deposition Exhibit 3 was marked.)

Q. Officer, do you recognize Exhibit No. 3?

A. I believe it is the handout we received in the training Academy.

Q. And does this appear to be a true and correct copy of that handout?

A. It was awhile back. I believe I have seen this. I just can't recall if it was in CIT or in the Academy.

Q. Why don't you take a look at the Bates stamp number, and that is the number in the lower right-hand corner, and go to page 001189.

A. Okay.

Q. And I am going to represent to you, Officer, that my understanding of this document was that you actually received it in the training Academy, rather than the CIT program. When I am asking you these questions, I would like you to assume that that is so, and this was information you would have had available to you in May of 2003, okay, Officer?

A. I recognize the document. I just don't know if I received it in the training Academy or if I received it in CIT.

[43] Q. Okay. Let me than ask the questions more generally. On the right-hand column of that page, do you see the little box, and it has two headings, what to do and what not to do?

A. Yes.

Q. The first bullet point is, "Stay calm and don't overreact," First of all, do you agree that that is something you should do when dealing with the mentally ill?

A. You should do that with everybody, yes.

Q. Why is it important to do that?

A. It helps deescalate situations when you are speaking with a calm manner and respecting people.

Q. Would you agree, sir, that taking aggressive actions towards a person may oftentimes be interpreted by that person as something opposite of calm?

A. No.

Q. You are a fairly athletic-looking person, and officers generally carry themselves with an air of authority. That is magnified when they have their uniform and the tools of their trade. Would you agree that that can often be intimidating to people?

A. Yes.

Q. And would you agree that when an officer, whether it be for officer safety issues or to apprehend a suspect or for whatever reason, takes a physical or aggressive act [44] toward a person, that can 'actually make what is already an intimidating situation more intimidating?

A. No, I don't agree with that.

Q. Why don't you agree with that?

A. I don't agree. If someone is—if somebody is acting aggressively towards us, you have already got

an escalated situation. At times we are forced to act based on our authority in that manner. Strictly for officer safety.

Q. If a person is not directly posing a physical threat to an officer or to—or to a third party, and is not expressing a suicidal ideation, is that a situation that instead of engaging in a physical act, an officer should attempt to deescalate the situation?

A. Yes.

Q. Bullet point No. 2 is, "gather information from family or bystanders." Is that important?

A. It is.

Q. Why is that important when dealing with the mentally III?

A. As I mentioned before, if time is on your side, if you can talk to a family member or a neighbor who knows the history of this person, that helps you with your decision-making process.

Q. In the Herring matter did you have occasion to talk to any family members or bystanders?

[45] A. No.

Q. That is a little bit of an unfair question, because it is my understanding that there was one person on scene that directed you and Officer Carroll to the place where Officer Darress was. Do you recall that?

A. I don't recall that person. I followed Officer Carroll.

Q. Would you also agree that a source of information would also come in the form of information regarding prior police contacts with a person?

A. Meaning, for example, a premise history? You are asking me if I can run, a person to see how many contacts we have had with them?

Q. And the nature of those contacts.

A. I can run—yes, yes, you can.

Q. So, one of the sources of information. that is available to you as you are responding to a scene is a history of contacts, at least at that address?

A. Yes.

Q. Under what circumstances do you get that information versus not get that information?

A. It varies. Sometimes our dispatchers will run a person and let us know that we have had numerous contacts with them, check our BOLOS, which means be on the lookout. Or if you have time, you can try and run that person and try [46] to find out. But based on the situation, it is all based—situational based, I would say.

Q. When responding to the Herring matter, do you recall whether you were given information on prior CSPD contact with Mr. Herring?

A. I don't believe so.

Q. If Mr. Herring had contact with the CSPD that was suggestive of abnormal thinking or mental illness prior to his contact with you, would that have been information that you would have liked to have had?.

A. Yes.

Q. And it is fair to say you had no such information?

A. I can't recall any.

Q. The next bullet point is, "Indicate that you are trying to understand and help." What is the importance of that?

A. When dealing with mentally ill, I am assuming?

Q. That's correct, sir.

A. That is very important in my eyes. You need to let a person know that you are trying to understand what they are going through, and that ultimately you want to help them.

Q. Did you during the incident with Mr. Herring at any time have any conversation with Mr. Herring?

A. No.

[47] Q. So, it is fair to say there was no point in which you had a discussion with Mr. Herring where you indicated to him that you were trying to understand and to help him?

A. No.

Q. I asked the question poorly.

A. Okay.

Q. Is it correct that you did not have a conversation with Mr. Herring?

A. Yes.

Q. Where you indicated that you were trying to understand and help him?

A. Yes.

Q. And the next bullet point, "Speak simply and briefly and move slowly." Again, to the extent you did not have a conversation with him, you didn't speak with him slowly or briefly, right?

A. No.

Q. What is the importance of moving slowly?

A. For example, if somebody is suffering through a schizophrenic act, moving lastly—that is not a word—moving quickly could really escalate a situation.

Q. And the same is true if a person is delusional?

A. Correct.

Q. And the same is true if a person is in a manic phase of a bipolar disorder?

[48] A. They could possibly view that as an aggressive move.

Q. Now, you would agree, sir, that when you enter a home, or in this case, oh apartment by force, that is an aggressive move?

A. Yes.

Q. And it just stands to logic if you kick someone's door in and enter in a forcible fashion that most people would see that as aggression?

A. Sure.

Q. And when you enter an apartment by force, you are not moving slowly; you are moving quickly for officer safety reasons, correct?

A. Yes.

Q. The next bullet point is, "To remove distractions, upsetting influences, and disruptive people from the scene." What is important about that?

A. Upsetting influences, if you have got somebody there that is creating more of a problem or adding fuel to the fire, if you will. I would say that is specific probably more to domestic disturbances, and disruptive people from the scene, same thing.

Q. Now, would you agree that sometimes, again, the tools of the trade of a police officer, the officer's demeanor, the officer's tools, the manner in which the [49] officer presents himself, that can be an upsetting influence to some people?

A. Yes.

Q. And when a person has expressed fear of law enforcement and has expressed that he believes or she believes that law enforcement is there to injure them, that is certainly a case where the person is being upset by law enforcement intervention, correct?

A. Yes.

Q. What do you do as an officer when you make contact with a person, you make all assessment that they may be suffering a mental illness, and they state to you, "I am afraid of you; I think you are here to hurt me"?

A. In that situation I will move back, still talk to them calmly. Always emphasize that we are here to help you, move back. Have another officer try to find

possibly a mental health worker that might be associated with this party or family member.

Q. Would you agree that when contacting the mentally ill one of the things you want to do is try to keep them talking to you?

A. You want to keep them engaged, whether it is talking or focused on you.

Q. And you had used the word "if time is on your side," or the phrase "time is on your side." Is one of the [50] ways of ensuring that time is on your side or at least making it more likely that time is on your side is maintaining engagement with the person?

A. Yes.

Q. So, the more that you can speak with the person or have a conversation with the person, get them talking to you, the more that time is on your side?

A. Once again, the situation dictates that, though.

Q. And the more that time is on your side, the more options are available to you as an officer, correct?

A. It—yes. Yes.

Q. It is true you as an officer need to take into consideration how the very fact that your presence may affect the person?

A. That my presence may affect the person?

Q. That's right.

A. Specifically in a mentally ill?

Q. Yes. Specifically for the mentally ill.

A. No. I don't take that into account every time I go on a call.

Q. The next bullet point is, "Understand that you may not have a rational discussion." Do you agree with that statement?

A. Yes.

Q. What do you as an officer do 'when somebody is [51] speaking irrationally to you, making irrational statements?

A. Listen.

Q. And, again, is that one of those times where you are engaging the person and, again, buying more time for the officers and more options for the officers?

A. Trying to make an assessment, yes.

Q. And the next bullet point is, "Recognize that the person may be overwhelmed by sensations, thoughts, frightening beliefs, sounds, voices, or the environment." Do you agree with that statement?

A. Yes.

Q. What is the importance of recognizing that a person may be overwhelmed by the things within their environment?

A. Kind of dictates the way you act. If someone is overwhelmed with thoughts, or frightening beliefs, it is going to dictate the way you act.

Q. If somebody is overwhelmed with frightening beliefs, how do you act? What do you do?

A. It is—that is too broad to answer. What beliefs are you referring to?

Q. Let's assume, Officer, for the purposes of this question that you arrive on a scene and you make an assessment that the person is suffering from some type of mental health crisis. The person is talking with you, and [52] as part of that discussion, indicates to you that he is afraid of you, and he believes that you, are there to hurt him. Would you agree that that is an expression of a frightening belief?

A. Yes.

Q. And tell me how you consider that in the grand scheme of other things that you are faced with as an officer, and what you do with that information.

A. That particular situation that you presented, if the person is safe, is not threatening—is not posing a threat to himself or others, I will move other officers away, and I will try to maintain a rapport with him or her, and attempt to keep a discussion in order to buy some time on what we can figure out, phone calls to mental health or family.

Q. Is your answer complete?

A. Yes.

Q. Next bullet point, "Be friendly, patient, accepting and encouraging, but remain firm and professional." Do you agree with that statement?

A. Yes, I do.

Q. Next bullet point, "Be aware that your police uniform, gun, handcuffs, and nightstick may frighten the person." Do you agree with that statement?

A. Yes, I do.

[53] Q. And you agree, Officer, that that is something that you need to take account of when contacting people?

A. That is something that you do need to think about; however, based on our calls for service, our legal authority to be there dictates that we are in a uniform. But, yes, that is something you need to think of.

Q. The last sentence of that particular bullet point is, "Reassure him or her that you don't intend harm." Do you agree with that statement?

A. Yes, I do.

Q. Would you agree, sir, that forcibly entering an apartment would be counterindicative that you don't intend to harm?

A. Would I agree us entering an apartment—

Q. Forcibly?

A. —forcibly is indicating that we are intending to harm? Did I understand you correctly?

Q. Yes.

A. No.

Q. Okay. Would you agree that oftentimes when dealing with the mentally ill, particularly those who have expressed fear of law enforcement, entering an apartment by force would not be a reassuring gesture that you do not intend to harm?

A. In that scenario, yes.

* * * *

[58] person doesn't comply, do you as an officer assume that they are intentionally not complying?

A. No.

Q. Would you agree that sometimes a person may have disabilities that would prevent them from complying with your orders?

A. Yes, I would.

Q. As an example, if you were contacting a paraplegic and you requested that they stand, they couldn't comply with that order, right?

A. Yes.

Q. And you would agree, sir, that based on your Academy training, that you know that sometimes mental illness interferes with the person's ability to understand and comply with police commands, correct?

A. Yes.

Q. I am not going to mark this as an exhibit, Officer, because more than anything I am curious. in your answers .to discovery, and I don't know why it is in here, is a newspaper article with the title Stroke Victim Thought to Be Drunk Seeks Millions From the State Police. Do you recognize that?

A. No, I don't.

Q. Do you know why it is contained within the materials I got?

[59] A. I do not know. I do not know.

Q. Have you seen this article before?

A. 1 can't say that I have.

Q. How much training have you received on medicolegal issues?

A. On medicolegal issues?

Q. Yes.

A. Very limited.

Q. And how much training have you received on officer liability as it relates to the mentally ill?

A. Very—very limited.

Q. Officer liability as it relates to interaction with disabled populations?

A. Once again, I would say very limited.

MR. FRANK: I would like to take a break.

(Brief recess from 10:23 to 10:32 a.m.)

BY MR. FRANK:

Q. Officer, is there anything specifically about your CIT training and the things that you learned in the CIT training that you and I haven't discussed today?

A. No.

Q. Is there anything about your training as it relates to the mentally ill that you received in your 22-week recruit Academy that you and I haven't discussed today?

[60] A. No.

Q. During your 15 weeks of training that you received after the Academy, did you receive any specific training regarding dealing with the mentally ill?

A. No.

Q. Would it be fair to say that what that 15 weeks really is is riding along with a more experienced officer and being assessed by that officer in a variety of different. circumstances?

A. Yes.

Q. Do you recall whether during your 15 weeks you were assessed in any situation relating to the mentally ill?

A. No.

Q. And by no, do you mean you don't recall, or you do recall and you were not in any such situation?

A. I don't recall.

Q. Do you recall during daily roll calls receiving training as it relates to interaction with the mentally ill?

A. No.

Q. Chief Velez, when Iliad an opportunity to speak with him, talked about certain training videos that you all get every now and then.

A. And we do get them occasionally in our line-ups, yes.

Q. Do you recall any training videos specifically [61] relating to interaction with the mentally ill?

A. Prior to the incident?

Q. Prior to the incident.

A. No.

Q. How about subsequent to the incident?

A. Yes.

Q. Tell me about that. How many—

A. I vaguely remember a video dealing with special populations.

Q. Has the emphasis on training as it relates to special populations changed from the time of the incident with Mr. Herring to the present?

A. No, just only with the add of—the addition of the CIT training.

Q. That was a pretty significant, wasn't it?

A. CIT?

Q. Yes.

A. I believe it was, yes.

Q. Your three times a year in-service training, any of that deal with the mentally ill?

A. As I recall, I am trying to remember if our in-service—I believe maybe one time did, but I can't recall.

Q. And your elective training with the exception of the CIT training, did you have any training as it relates to

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[66] length with Officer Carroll, and I am going to try not to repeat too much of what I asked him, but I would like to ask you just some questions on it. If you will turn to the second page of the document, which has the Bates stamp No. PL 00366, my understanding of this document is that this is information being relayed to the dispatcher by a caller; is that a correct understanding?

A. This is being relayed—I am pretty sure the process works up there, a call comes in to a call taker. The call taker decides whether that should be dispatched. They then send it to the dispatchers, who receive this information. And the call takers update the call screen. Dispatchers will then let us know on the streets what the updates are.

Q. So, as the dispatcher is receiving information from the call taker, then that is relayed to the officers?

A. From dispatch, yes.

Q. Got it. So, the first call on this looks like it came in at 14:34:05, which states that a neighbor is banging on front door, trying to possibly get inside. Is that correct, Officer?

A. Yeah. According to this call screen, correct, yes.

Q. Do you recall whether that information was relayed to you?

[67] A. I remember hearing it via the radio. I didn't have it on my call screen in the car, because I wasn't actually dispatched to the call yet. But I could hear it on the radio.

Q. The next entry is "RP," and I assume that is reporting party, correct?

A. Reporting party.

Q. "Is in house, suspect outside right now." Do you recall hearing or receiving that information?

A. Vaguely. I can't remember every specific statement that was given over the radio, but I just remember hearing the call.

Q. And what I am going to do, Officer, is I am going to ask you the specifics. As we talked about before, if you don't remember something or don't know something, tell me that. The next call that came in appears to be at 14:34:30, which indicates no weapon. Do you see that, Officer?

A. Yes, I do.

Q. Do you recall that being broadcast?

A. No.

Q. Do you recall ever receiving any affirmative information that Mr. Herring was armed?

A. No.

Q. The next line just says, "Verbal," and I am not sure what that means. What does that mean?

[68] A. Based on this call, it is just a verbal altercation at this point.

Q. And do you remember hearing that, or is that your understanding?

A. No.

Q. Next line, "Unknown if suspect is at door now or not." Do you recall that?

A. No.

Q. Do you recall, "Suspect named Greg, black male, 35 years old, 6 foot 2, 240, short black hair"? Do you recall that?

A. This is—I think I need to step back a little bit. Because I can remember hearing this over the radio, specifically I don't remember the specifics, but I remember hearing the call go out over the radio. That is what made my decision to clear to go help. So, if I am sitting here saying, no, I don't remember this, that would be false. I can't remember the specifics of what was being aired, but I do vaguely remember the call going out. Does that make sense?

Q. It does, Officer. What I am going to do is ask a question that I think gets said on the record, and I am going to go back to the specifics. What was your understanding of what was occurring at the time that you cleared to respond to this call?

[69] A. That there was—that there was a disturbance up at the above address at the Grantsville Grove address. That is all I knew.

Q. And that to the extent that each of these individual pieces of information described what that disturbance was, you don't specifically recall hearing these things, although you may have?

A. Correct. That's a correct statement.

Q. So now, and I need to do this for the record, Officer, I am not trying to trip you up. I think we got on the record where you are. I am going to ask you some specifics, okay?

A. Okay.

Q. Do you specifically recall being told that the kids are now running away from the apartment, containers and furniture being thrown out of the apartment?

A. No.

Q. You would agree, sir, that that would be important information for an officer to receive? -

A. Yes.

Q. Do you recall ever having any affirmative information that anybody other than Mr. Herring was in the apartment?

A. No.

Q. Do you recall hearing that the suspect was now [70] nude and in his Own apartment?

A. Yes.

Q. Do you specifically recall hearing that he was bleeding from his arms?

A. Yes.

Q. Do you specifically recall hearing that he was tearing up his own apartment?

A. Yes.

Q. Do you specifically recall at some point that he was bleeding from his abdomen?

A. Yes.

Q. What is a code 1?

A. Code 1 means only the officers that are on that call will use that radio channel.

Q. And is that a higher degree of importance than Other types of calls?

A. Right. Only the officers that are on that specific call for service will be on that channel.

Q. Did you have any time, Officer, where you had difficulty receiving radio communication on the way to the scene?

A. Yes, I did.

Q. Tell me about that. Where did you have difficulty receiving, and if you can take a look at this and maybe you can piece it together by looking at this dispatch log.

[71] A. This was prior—prior to arriving on scene, or—

Q. Let's break it up. Prior to arriving on scene, were you able to—

A. As I arrived on scene, as I pulled into the complex, and I was behind Officer Carroll, my radio was breaking up. I remembered that is when I started having problems.

Q. So, up until the point where you actually got to the scene, you didn't have any difficulty with radio communication, but as soon as you got to the scene, you started having problems?

A. I would say that is, yes, that is true.

Q. So, even though you may not specifically remember each of the individual facets of information we have been going over, those are things that you probably would have heard coming over the radio?

A. Yes. I would say.

Q. Do you recall when precisely it is you arrived?

A. I do not.

Q. Were you 4 Adam 05?

A. I am trying to find out. I think 4 Adam 64 was Officer Carroll.

Q. And so I am not hiding the ball, Officer, it looks like Officer Carroll arrived at 14:49:37. The next arriving [72] officer that I see is 4 Adam 5, who didn't arrive until 14:56:51.

A. Where are you at, because I am still on the first page and I am not seeing—

Q. Take a look at the Bates stamp No. PL 00368, which is the third page of the document.

A. Okay. This is kind of broken up. Okay. And you said 64, which was Officer Carroll, arrived at what time?

Q. At 14:49:37.

A. Okay. I am there.

Q. And then it looks like the next officer arrived at 14:56:51, but my understanding both from speak-

ing with you and speaking with Officer Carroll is you all arrived about the same time. SO I can't figure out the time difference.

A. I can explain that to you. It is one of two things. When we first—whenever we arrive on a scene, we always hit our computer showing that we have arrived on the scene. Sometimes based on the scene cops get out and don't do that. So, it is still showing them en route, but they will call on the radio saying I have arrived.

Scenario No. 2 is you hit the button saying that you are there, showing that you have arrived, but it doesn't go out, meaning you don't have any reception to send that signal, although you did it, So that might be the discrepancy in the time.

[73] Q. Is there a reason why Officer Carroll would have had reception and you wouldn't have had reception?

A. No. There are certain areas in town where I can sit right next to another car. He can have reception and I can't. I can't explain it.

Q. Has that been fixed as of late? That concerns me as a citizen.

A. I am talking computer reception. Radios, the radios, they have done some upgrades on, yes.

Q. Assuming that you arrived at about the same time as Officer Carroll, which would be 14:49:37, you would anticipate that you had radio communication or was able to receive radio communication up to that point?

A. Probably—I remembered as I pulled into the if I recall correctly, I pulled into the complex, and as I pulled into the complex, it took about 20 seconds to get back to where we were going to find it. That is when I started losing it, as I pulled into the apart-

ment complex. I can't give you an exact time or location, but I remember it started to, be broken up.

Q. Okay. Thank you. There is a second indication, "Kids ran from scene." Do you recall hearing that second statement that the kids had left the scene?

A. No, I don't.

Q. Do you recall the call coming in, "Inside the

* * * *

[78] Q. And at that point did you position or station yourself in a particular place?

A. No. I would say as I recall I stood over on the northwest corner of the building.

Q. I am having a little bit of difficulty understanding where things are, Officer. Do you mind if I ask you to draw a picture for me?

A. No. This is to the best of my recollection. Do you want me to explain it as I am drawing it so you can understand it better?

Q. That would be great

A. This is going to be the east. This is going to be the west. We entered here. Here is the driveway. As I can recall, these were apartments over here. These were buildings. These were buildings. We parked the cars here. And I can't remember if we were side-by-side or if I had parked behind him.

Q. Can you circle that and put a 1 by it?

A. What do you mean?

Q. The two Xs by the cars.

A. Put a 1?

Q. Yes. The 1 represents where the cars were.

A. The 1 was the cars. I am trying to recall. There was a sidewalk that came this way.

Q. And by that, that would be to the north?

[79] A. That would be heading to the north. This is south. The apartment building was right here.

Q. That is immediately to the east of the sidewalk?

A. Yes. This, as I recall, was the entrance to the apartment. There was a window back here. And to answer your question on where I was standing, Officer Darress was about right there. I just Came around the corner and I stood right there.

Q. Could you circle the window nearest to Officer Darress and label that as 2?

A. 2.

Q. Can you circle Officer Darress and label him as 3?

A. 3.

Q. When Officer Darress is at position 3, he is about 4 feet from the window?

A. That is just an estimate. 3 or 4 feet, I would say.

Q. Pretty close?

A. Yes. He was over on this side as I recall.

Q. And then circle by you and put a No. 4 by that. And how far away from Officer Darress were you?

A. A couple feet, estimating. I don't know where Officer Carroll was. I don't know if he was here or where—I want to say he was there, but I can't recall.

Q. So, if I were to ask you to put a No. 5 with [80] Officer Carroll, you don't have sufficient recollection to put Officer Carroll in that picture in a way that you are comfortable?

A. I know he was around with us back there, but I don't know exactly where.

Q. Could you be seen from the window?

A. By who?

Q. Great question. Thank you, Officer. Could you see in the window?

A. No. I couldn't see inside the apartment.

Q. And do you know based upon the angles whether somebody inside the apartment could see you?

A. Based upon the angles, I would say no.

Q. Did Officer Darress see you?

A. Officer Darress saw me, yes.

Q. How long did it take you to get from position No. 1 to position No. 3?

A. From here to here? Approximately 18, 20 seconds.

Q. Now, you indicated things were being thrown from the apartment; is that correct?

A. Yes.

Q. Were they being thrown beyond Officer Carroll; were they landing in front of Officer Carroll? Where were the belongings landing?

A. I can't attest to that, because I don't know where [81] Officer Carroll was standing.

Q. Do you know what, I keep messing that up, and I apologize to you, Officer. Where were they in relation to Officer Darress?

A. To Officer Darress, the items being thrown were in his—in his general direction, just out the window.

Q. Would it be fair to say that where Officer Darress was standing, anything being thrown out that window would be landing in his general vicinity?

A. Yes. Possibly could have hit him.

Q. They were coming in his direction?

A. Yes.

Q. When you got to position No. 4, what did you do then?

A. When I got to position No. 4, I observed items being thrown out the window. Officer Darress then directed me to go check the front door to see if it was unlocked.

Q. How long were you at position No. 4 before Officer Darress asked you to go see whether the door was unlocked?

A. I can't recall.

Q. Was it a matter of minutes or a matter of seconds?

A. It was probably—I estimate maybe a minute and a half.

Q. During that minute and a half, did you hear Mr. Herring say anything?

[82] A. As I recall, I just heard yelling.

Q. Do you recall specifically what was being yelled?

A. No; I don't.

Q. During that minute and a half, do you recall anything that Officer Darress said?

A. I remember Officer Darress talking to him, or talking—when I say him, now I know it is Mr. Herring. I didn't know who he was talking to. I remember him talking to the occupant of the apartment telling him to calm down, we want to help. That is all I can recall.

Q. And you don't know one way or the other what was said by the occupant of the apartment to Officer Darress?

A. No, I don't.

Q. Officer Darress would be the best one to answer that to the extent he is able to?

A. Yes.

Q. When Officer Darress requested that you check to see whether the door is unlocked, did he do that verbally?

A. Uh-huh.

Q. Is that yes?

A. Yes: I'm sorry.

Q. And was Officer Darress in sufficient proximity to the open window that you would expect the occupant to have heard him say that?

A. As I recall, he told me just go check the front [83] door in kind of a conversational tone like we are talking about.

Q. Was it loud enough to be overheard by somebody who was yelling?

A. I can't answer that. I don't know.

Q. Was the occupant yelling at the time that you were told to go unlock—check the front door?

A. I can't recall. I remember when I first got there was I heard yelling.

Q. And did you go check the front door?

A. Yes, I did.

Q. And could you put a No, 5 at where you checked the front door? How long did it take you to get from No. 4 to No. 5?

A. Probably 15 seconds.

Q. And did you check the door?

A. Checked the front door.

Q. Was it locked?

A. It was locked.

Q. At any point up to position No. 5, did you receive affirmative information that Mr. Herring was armed?

A. No.

Q. At any time before position No. 5 did you receive affirmative information that anyone other than Mr. Herring was in the apartment?

[84] A. No.

Q. Up to position No. 5, did you receive any information indicating that the dispatch call that the children bad run from the apartment was incorrect?

A. No.

Q. Up to position 5, did you receive any information that the dispatch call that there was no weapons was incorrect?

A. No.

Q. Where was Officer Carroll when you were at position No. 5?

A. As I recall, 1 believe—I can't recall if he came around with me to check the front door, or if he stayed back with Officer Darress. I am not sure.

Q. When you were at position No. 5, did you have any information that the occupant of the apartment was attempting to flee?

A. No.

Q. When you were at position No. 5, did you receive any information that the occupant of the apartment was attempting suicide?

A. No.

Q. How long did it take you to get from 5 back to No. 4? Let me ask it differently. Did you go back to No. 4 after checking the apartment, or did you go someplace else?

[85] A. I went back to 4, and I told Officer Darress that the door was locked.

Q. How long to get back to No. 4?

A. 15 seconds, 13 seconds.

Q. And did you verbally tell Officer Darress that the door was locked?

A. Yes.

Q. And based upon your proximity to the window and the things which were occurring, would you anticipate that the occupant would have heard that conversation? Again, this is one of those things, if you do not know, tell me you don't know.

A. I don't know. I don't know.

Q. All right. What happened when you got back to No. 4?

A. Told Officer Darress that the door, front door was locked. He directed myself and Officer Carroll to go to the front door and enter the apartment.

Q. Where was Officer Carroll when you got back to No. 4, do you remember?

A. As I can recall, he was back here, but once again, I can't recall if he went with me the first time or not.

Q. And how long did you stay at No. 4 after you returned to No. 4 before Officer Darress said, okay, go ahead and enter the apartment?

[86] A. Probably 30 seconds.

Q. And what exactly did Officer Darress say to you as it relates to entering the apartment?

A. I can't remember the exact conversation. I just remembered the decision was made to enter the apartment. So, I can't say verbatim what he told me to do.

Q. Who made that decision?

A. To enter the apartment?

Q. Yes, sir.

A. Ultimately—well, Officer Darress made the decision to enter the apartment.

Q. And then it is my understanding that you went from position No. 4 back to position No. 5?

A. Correct.

Q. And was Officer Carroll with you?

A. Yes, he was.

Q. And did you have any conversation with Officer Carroll between position No. 4 and position No. 5?

A. Maybe. I believe we discussed what we were going to do once we entered the apartment and what we were attempting to find.

Q. Tell me the content of that discussion.

A. I can't recall the specifics of the conversation. We always talk about a game plan of going into some-

where, of an unknown. So, as I recall, that was discussed. [87] And—but other than that, I can't recall the specifics of what we actually discussed.

Q. Did Officer Darress at any time explain to you his decision that led to the request for you to enter the apartment?

A. No.

Q. And did it take about 15—excuse me, 15, 20 seconds to get from No. 4 back to No. 5?

A. Approximately.

Q. So, whatever conversation you had with Officer Carroll between position 4 and position No. 5, it was a pretty brief conversation?

A. Yes.

Q. Describe to me your entry into the apartment.

A. As I recall, I attempted to kick the door, and it didn't open. I then attempted to kick the door again. And 1 think I made the door ajar. And then I can't remember whether I kicked it a third time or if Officer Carroll kicked it and forced the door open. I remember kicking the door twice.

Q. About how long did that take?

A. Oh, probably 8, 9 seconds.

Q. And then did you and Officer Carroll enter the apartment?

A. Yes.

[88] Q. Who entered first?

A. I can't recall who entered first.

Q. Can you tell me what you could see when you entered the apartment?

A. I entered the apartment. And as I recall, I went straight to the front—it appeared to be like a dining room or a kitchen/den area. I observed all the windows of that area broken. I saw blood, things thrown, items thrown throughout the—that area.

Q. It is my understanding that when officers enter a Structure, as they are moving through the structure, they make at least some attempt to clear the rooms they are passing, or at least determine whether it is safe to go past those rooms.

A. Correct.

Q. Did you and Officer Carroll do that?

A. I cleared the front room. Officer Carroll, I believe, announced police, and walked down the hall. If I can recall the apartment correctly, there was a hall and it made a left back into the master bedroom. And there was one or two rooms over on the right side. But you never walk by an open—an unopened door not knowing if there is a threat behind it.

Q. So, it is a fair statement to say that as with—as consistent with protecting yourselves and officer [89] Safety issues, you as you went through the apartment were at least looking, and by you I mean you and Officer Carroll, were at least checking out those rooms to determine whether somebody else might have been there?

A. Correct. I had my area of responsibility, which was the den, living room, and kitchen area. He had his area of responsibility of going down the hall and clearing rooms. I know he opened a door and I looked in the door after he had gone by, but I don't know what he had cleared in there.

Q. Is it a fair statement that as you went through the apartment and made attempts to clear the apartment, that you did not determine that there was anyone else present in the apartment?

A. In my area of responsibility that I had to clear, I did not find anybody.

Q. And Officer Carroll didn't find anybody as well, correct?

A. I can't—I can't attest to what he had found.

Q. Well, if he had found somebody else in the apartment, you probably would have known about it, right?

A. He would have let us know. I don't know what he—I don't know what he found throughout the rooms that he had cleared.

Q. Okay. Let me ask it a different way. I appreciate where you are coming from. I told you not to [90] tell me anything other than what you know. And you don't know that. Did Officer Carroll at any time indicate to you that there was anyone else in the apartment?

A. No.

Q. Okay. And from that did you understand that there was no one else in that apartment?

A. Not until I confronted Officer Carroll in the hail where he confronted Mr. Herring.

Q. From the time that you kicked the door until the time that you physically saw Mr. Herring, how Long a period of time passed?

A. Boy, I would estimate 30 to 40 seconds. It is hard to—

Q. Was Officer Carroll in the presence of Mr. Herring at times when you were not?

A. Yes.

Q. For how long a period of time?

A. Approximately 10 to 13 seconds, give or take.

Q. And was that the period of time that it took you to clear the rooms that were your responsibility and then get back to him?

A. Yes. And—actually I would increase that time to probably 18 seconds to 20 seconds, because there was a time where a door was closed and I couldn't see him and Mr. Herring. That is later in the incident, though.

[91] Q. Let's go before that incident.

A. Probably 13 seconds.

Q. During that 13 seconds, did you overhear any statements made by Officer Carroll?

A. I heard him confront Mr. Herring in the hallway, and I heard him telling him to calm down, we are here to help, those type of statements. I can't say specifics of what I heard. I know they were—I do remember those statements specifically.

Q. Do you recall any statements made by Mr. Herring?

A. Mr. Herring, just statements I heard prior to confronting him, just yelling something about God, but I can't remember specific statements.

Q. At the time that you kicked the door, had you formed an opinion as to whether the occupant was suffering from a mental health crisis?

A. No.

Q. Did you at any time during your confrontation with Mr. Herring, at any point, form the opinion that he was suffering a mental health crisis?

A. No.

Q. As you sit here today, do you believe he suffered a mental health crisis?

MR. WHITE: Objection. Calls for a medical opinion.

[92] BY MR. FRANK:

Q. Let me go back up. You have received training as a police officer in your Academy, right?

A. Yes.

Q. Part of that training has been in relation to the mentally ill, correct?

A. Yes.

Q. Part of that training has been to make assessments relating to the mentally ill so that you can respond appropriately as an officer?

A. Yes.

Q. And in addition to that, you have had 40 hours of CIT training, correct?

A. Yes.

Q. And a portion of that 40 hours of CIT training was to make assessments on scene as to whether someone is suffering a mental illness so you can respond appropriately, correct?

A. Yes.

Q. So, based upon the assessment of a police officer, not a mental health worker, because I know that you are not one, but based upon that assessment structure that you are trained in, as you sit here today, do you believe Mr. Herring was suffering a mental health crisis?

A. I can't address that, because I had CIT after the [93] incident.

Q. I know. And I am asking as you sit here today.

A. As I sit here today?

Q. Yes.

A. No.

Q. Why do you form that opinion?

A. Because at the time of the incident, I dealt with a couple prior, maybe two or three mental health issues, other calls for service. Based on the training that I had with mental health prior to CIT, and the narcotics that have seen—the narcotics, how they make people act, I was under the assumption that he was under the influence of narcotics. I had never seen a mentally ill person act in that manner.

Q. How many mentally ill people had you. Contacted prior to the incident with Mr. Herring?

A. I can't recall. Three, four.

Q. Fewer than ten?

A. Yes, fewer than ten.

Q. So, it would be a fair statement, Officer, that as of that point in your career, you had had, relatively little contact with the mentally ill?

A. Yes,

Q. And would it also be fair to say that as of that point in your career, with the exception of the four hours [94] of training that you received at the recruit Academy, you had had relatively little training as it related to the mentally ill?

A. Yes.

Q. We had discussed earlier whether it was—whether when you respond on a scene and you don't know whether someone is suffering from a substance abuse problem or a mental illness, and I had asked you questions regarding do you assume at that point that the person is mentally ill, did you make any assumptions regarding Mr. Herring when you appeared on the scene and you saw his behavior?

A. The only assumption that I can recall is that he was under the influence of narcotics.

Q. Would you agree that the manner in which you treat somebody who is under the influence of narcotics is different than the manner in which you treat somebody who is mentally ill?

A. No.

Q. If I can understand your statement, Officer, is that you believe that in the type of situation that you responded to, whether someone was suffering a mental illness or whether somebody was under the influence of narcotics, would not have a bearing in appropriate officer response?

A. Once again, the situation would dictate that.

Q. I am talking about the situation you were in.

[95] A. The situation with Mr. Herring?

Q. Yes.

A. In that situation, based on the way he was acting, I would have—I would have treated it the same as someone who was aggressive to me on the streets. Mentally ill, under the influence of narcotics, alcohol, because I did not know.

Q. Since your CIT training, would you have handled the situation different?

A. Possibly.

Q. What would the possible differences be, Officer?

A. I am now more trained—I am trained better in knowing possibly some of the signs that they are showing for a mental illness.

Q. I think in the discussion of what occurred, we were at the point where you had cleared the rooms and were back in contact with Officer Carroll, and you heard Officer Carroll making statements to Mr. Herring; is that correct?

A. Yes.

Q. And I cannot recall, Officer, whether I asked you whether you heard Mr. Herring make any statements to Officer Carroll. I take that back. You said he said something about being God, right?

A. Not about being God. I just heard the word "God."

Q. And aside from that, you didn't hear any [96] conversation between the two?

A. No.

Q. What happened next?

A. I heard Officer Carroll confront Mr. Herring down the hall. Once I determined that there was nobody nobody else in the residence in my area, I went back down and saw Officer Carroll confronting Mr. Herring.

Q. How long did that process take?

A. Probably from the time I cleared my area to him, 8, 9 seconds, give or take.

Q. What happened then?

A. Officer Carroll was confronting Mr. Herring at approximately 3 to 4 feet away. Maybe a little bit wider distance. Telling him to calm down, we are here to help. Mr. Herring continued throwing items, just unknown items throughout—throughout the apartment. As a matter of fact, I remember at one time a bottle or an object coming , down the hall as I was going back to confront Officer Carroll.

Q. And it is fair to say that objects were being thrown in all kinds of different directions?

A. Yes. But the—whatever object was thrown down the hall was being thrown down the hall towards—it appeared to be Officer Carroll.

Q. It was certainly in Officer Carroll's direction, [97] right?

A. Correct.

Q. But there were also things that were thrown that were not in Officer Carroll's direction?

A. True.

Q. And where was Officer Darress at this time?

A. Officer Darress, I believe, was still on the outside of the apartment.

Q. Why do you believe that?

A. Because he wasn't in with us.

Q. So, you don't necessarily know exactly where he was, because you didn't see him. You just know that he wasn't in the apartment?

A. Correct.

Q. At the time that you were in the apartment, there were two officers and one Mr. Herring at some point, correct?

A. Yes.

Q. Then what happened? You see Officer Carroll confronting Mr. Herring, Mr. Herring is throwing things in all different directions. What happens then?

A. He—as I can recall, I believe Mr. Herring took a step towards Officer Carroll, who Officer Carroll then sprayed him with OC.

Q. In your CIT training, and I may have asked you [98] this, Officer, I cannot recall, did you receive any training on the use of OC sprays on the mentally ill?

A. No.

Q. What happened when he deployed the OC spray?

A. He deployed it less than—less than a second, maybe a quarter of a second. Hit Mr. Herring across the eyes. And it didn't affect Mr. Herring at all.

Q. Isn't it more accurate to say that it didn't have its intended effect; you don't know whether it hurt him, you don't know whether it stung, you just know it didn't cause compliance; isn't that a more fair statement, sir?

A. Yes. I would say. that is a fair statement.

Q. And so he is sprayed?

A. He is sprayed. He wiped his eyes one or two times. Approached Officer Carroll and said, "Now we arc all going to die." At that point, he tackled Officer Carroll, as I can recall, and a door closed. That was the other 5 or 6 seconds that I had lost sight of Officer Carroll.

Q. So, how long from the time Mr. Herring was sprayed until the time that he tackled Officer Carroll and the door closed?

A. Probably 3 seconds.

Q. And then the door was closed for about 5 seconds?

A. 5 or 6 seconds, give or take.

Q. And then what did you do when that door closed?

[99] A. I forced the door open to get to Officer Carroll.

Q. What did you see when you entered—first of all, what room were they in?

A. That is one thing—I believe they were in the hallway near the bathroom, from what I can recall, because they weren't in the master bedroom. Ended up in the bathroom is when I opened the door, they were falling into the bathroom.

Q. What did you do then?

A. I attempted to grab—trying to piece it together piece by piece. I attempted to grab Mr. Herring's legs, because they had fallen into the bathroom. Officer Carroll was up to the—he was up in the midsection of Mr. Herring.

Q. What was Officer Carroll's position bodywise vis-a-vis Mr. Herring's position?

A. Near—as near as I can recall on the side on his—I want to say his right side.

Q. Are you familiar with the term "right-side control"?

A. Right-side control?

Q. Yes.

A. In the Academy they discussed that.

Q. Had he established right-side control?

A. I don't believe so.

Q. Where were Mr. Herring's arms?

[100] A. Mr. Herring's arms, I can't recall.

Q. Do, you recall where Officer Carroll's knee was vis-a-vis Mr. Herring's body?

A. No, I don't.

Q. Do you recall whether Officer Carroll's body was extended past the midline of Mr. Herring's spine?

A. The midline? Explain.

Q. The spine runs down the middle of the back.

A. Correct.

Q. And if he is establishing right-side control, what I am trying to figure out is had he come across the spine to the left shoulder?

A. I can't recall.

Q. Was his body above Mr. Herring's body?

A. At the time that I first saw them, he was—I believe he was on the right side of him, not above him, but I can't recall the exact body positioning.

Q. How much training do you guys have in ground fighting?

A. It is taught throughout the Academy. I can't remember the week—the week timeframe.

Q. Did you have any training above and beyond the Academy training in ground fighting?

A. No.

Q. I know a lot of you guys by you guys, I mean [101] CSPD officers—are practitioners of Krav Maga. Are you a practitioner of that specific art?

A. No.

Q. Do you know whether Officer Carroll is?

A. No.

Q. How long from the time that you entered the room where Officer Carroll and Mr. Herring were until Officer Duress showed up7

A. Under a minute I would say. I can't attest.

Q. Did Officer Darress go right to the room where the confrontation was occurring?

A. I recall he ran in with a blanket or a quilt.

Q. What did he do with the blanket or a quilt?

A. We attempted to gain control of Mr. Herring's arms, because, No. 1, he was bleeding profusely, and No. 2, there was water. I don't know how water got into that bathroom. It appeared to be a broken water

main or something. And he was nude. And we couldn't control him. So, Officer Darress attempted to wrap it around his arms so we could hold him. And that didn't work. And I don't know where the blanket went from then.

Q. Did there come a point where one of his hands were cuffed?

A. I can't recall. I can't recall if one of his hands were cuffed or not.

[102] Q. Do you recall whether at any point he was completely cuffed?

A. I don't believe he was ever completely handcuffed. Once again, I was down at his ankles, but I don't recall if he was handcuffed or not.

Q. Were you ever sprayed with OC?

A. Yes.

Q. Tell me how that came about.

A. During this incident or prior?

Q. No. During this incident?

A. During this incident, no.

Q. There was a report where somebody observed that you may have been, and I am trying to determine the accuracy of that report.

A. The only—the only spray that I would have gotten is when Mr. Herring was sprayed and we came into a struggle with him off of him. I remember feeling the effects of the OC. But I was never directly sprayed with OC.

Q. Were you at any time struck by Officer Carroll?

A. Not that I can recall.

Q. Officer Darress?

A. Not that I can recall.

Q. Do you recall striking either of those officers? And obviously not intentionally, I am not trying to suggest [103] that.

A. Not that I recall. The only contact really we would have had is when I took the PR-24 from Officer Carroll and put it up on the—on the sink area in the bathroom. That wasn't a strike by any means.

Q. Officer Carroll drew and attempted to utilize his PR-24, correct?

A. I can't remember who attempted, or who drew the PR. But I know there was a PR that was taken out.

Q. Did you see anybody try to use the PR?

A. The first time I saw the PR-24 was when Officer Carroll was trying to gain a hold of Mr. Herring with the PR bringing his arm back and it wasn't working.

Q. He was attempting to use it as a lever?

A. Yes. To bring his arm behind his back.

Q. Did you at any time see somebody strike Mr. Herring with their fist?

A. I can't say that I did. I don't believe I did. I heard Officer Carroll screaming at Officer Darress Officer Darress screaming, but I don't—I don't recall seeing fists, that I had seen.

Q. Were medical personnel called?

A. Medical personnel were already on scene prior to us getting there.

Q. Were they staged?

[104] A. Yes, they were.

Q. Where were they staged?

A. Do you want me to refer to this map?

Q. Yes. Why don't you go ahead and put a 6 where the medical was staged.

A. As I recall, you come around, you come through the complex here, circles around, this is all one drive. Circles around in here. Medical was right here. I believe there was one or two fire trucks. I

don't know if AMR was 7 there. I think they were, but I am not sure.

Q. Why don't you give me a 6 there, Officer.

A. A circle and 6.

Q. The medical was stationed at 6 before you got to station I?

A. Right. As we pulled in, they were sitting there.

Q. When did medical come into the apartment?

A. I don't know. I know that they entered. I don't I know when they came in. This was when all three of us were in the bathroom.

Q. Do you know how long the three of you were in the bathroom before medical came in?

A. I have no idea. I don't know the timeframe.

Q. Do you know how long the struggle with Mr. Herring lasted before you exited that bathroom?

A. It seemed like forever as I attested in my [105] interview, but I don't know a time frame on how long we were actually in the bathroom with him.

Q. Describe to me in as much detail as you are able the physical struggle. And, Officer, what I would like to do is to the extent you can recall it, relay to me the actions of the officers and the positions of the officers vis-a-vis Mr. Herring.

A. Okay. So, step back. You want the struggle first? Describe the struggle and then we will talk about their positions? Is that fine?

Q. That's fine. Any way you want to do it. Let me tell you what I am looking for, so you know how to answer the question. I want a description of the struggle, who did what, when they did it, what other people were doing at the same time. And it would help me in understanding what occurred to know where officers were. As an example, I know now that you were at Mr. Herring's feet. Which means that you probably aren't hitting him in the head, if any-

body was hitting him in the head.

A. Correct.

Q. It gives me some indication of things that did and did not occur.

A. Correct. The struggle, I remember at one point Mr. Herring was a big buy, and I attested he was 6,2, 6,4, this is after the fact, in my interview, 200-and-some

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BEST AVAILABLE COPY

record selected.

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[2J[H05-07-03                          PRINT CALL HISTORY                          PAGE 1
CAD.FILE.BACKUP. 473105
DR.............
DATE........... 05/02/03
RCVD........... 13:47:39
Dispatcher..... PCHAVECO
LOCATION....... 6134 ROMLEY PT; WINFIELD APARTMENTS
TYPE...........  HARA
CALL TYPE DESC.. HARASSMENT/THREATS
SERVICE........ P
AGENCY......... CSPD
AREA........... 4
DIST........... 4300
ZONE........... P4
Beat........... 49
CENSUS}TRACT#... 40
PDZ.............
IP............. N
PRIO}RITY...... 3
HCW............ 1
POD............  16
P  PO..........
   ARKS..................................... DATE.... TIME.... OPERATOR POD.
P IS TENANT;GREG HERRING 5414 GRANTSVILLE   05/02/03 13:48:37 PCHAVECO   16

                                            05/02/03 13:48:39 PCHAVECO   16
TIME LAPSE IS 5MIN AT 1218                  05/02/03 13:48:47 PCHAVECO   16
SUPS MAKING ALLEGATIONS AND DRIVING BY OFFICE 05/02/03 13:49:02 PCHAVECO 16
AND
 RP'S APT                                   05/02/03 13:49:06 PCHAVECO   16
                                            05/02/03 13:49:08 PCHAVECO   16
119B2
Call 473105 has been linked to call 473164. 05/02/03 15:11:59 PHUGHESA    2
OFFICER ON SCENE FROM LINKED CALL           05/02/03 15:27:21 PMARIASH    9
Cancelled by PMARIASH (9) at 15:27:23 on    05/02/03 15:27:23 PMARIASH    9
05/02/2003.
SLC                                         05/02/03 15:27:23 PMARIASH    9
RP LNAME.......... FNAME......... MI ADDRESS.............................
STANEART          STEPHANIE          6134 ROMLEY PT; WINFIELD APARTMENTS
PHONE.......
719-380-1580
VYR MAKE.. MODEL. COLOR.. VLIC.... ST. ADDITIONAL.............

SEX RACE HAIR EYES HT.. WT. CLOTHING-COMMENTS.............

  Date      Time     Unit  PSN   Status     Operator
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One record listed.
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PLAINTIFF'S EXHIBIT E

PL00365

443a

ıe record selected.

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[2J[H05-05-03                          PRINT CALL HISTORY                          PAGE 1
CAD.FILE.BACKUP. 473164
DR.............. C0314825
DATE............ 05/02/03
RCVD............ 14:33:08
Dispatcher...... PFOCHTER
LOCATION........ 5414 GRANTSVILLE GV #J101
TYPE............  DIST
CALL TYPE DESC.. DISTURBANCE
SERVICE......... P
AGENCY.......... CSPD
AREA............ 4
DIST............ 4300
ZONE............ P4
Beat............ 49
CENSUS}TRACT#... 40
PDZ.............
IP.............. Y
PRIO}RITY....... 1
HOW............. 9
POD.............   8
DISPO........... INFORMATION FOR REPORT/FOLLOW
                 UP
EMARKS..................................... DATE.... TIME.... OPERATOR POD.
   STATES NGBR IS BANGING ON FRONT DOOR,  05/02/03 14:34:05 PFOCHTER     8
.RYING T
  TO POSSIBLY GET INSIDE                  05/02/03 14:34:11 PFOCHTER     8
RP IS IN HOUSE, SUSP OUTSIDE RIGHT NOW    05/02/03 14:34:25 PFOCHTER     8
NO WEAP                                   05/02/03 14:34:30 PFOCHTER     8
VERBAL                                    05/02/03 14:34:34 PFOCHTER     8
UNK IF SUSP IS AT DOOR NOW OR NOT         05/02/03 14:34:45 PFOCHTER     8
SUSP;NAM/GREGG, BM 35YO 602 240 SHRT BLK HAIR 05/02/03 14:35:07 PFOCHTER 8
L&W   UNK CLOTHING                        05/02/03 14:35:40 PFOCHTER     8
NO INJ                                    05/02/03 14:36:11 PFOCHTER     8
SUSP NOT AT FRONT DOOR NOW,               05/02/03 14:36:16 PFOCHTER     8
SUSP LIVES IN APT JUST NORTH OF RP'S      05/02/03 14:36:36 PFOCHTER     8
KIDS NOW RUNNING AWAY FROM APT, CONTAINERS AND 05/02/03 14:36:51 PFOCHTER 8
  FURNITURE BEING THROWN OUT OF THE APARTMENT 05/02/03 14:37:00 PFOCHTER 8
UNK ETOH/DRUGS                            05/02/03 14:37:11 PFOCHTER     8
113D2                                     05/02/03 14:37:30 PFOCHTER     8
***RP CALLING BACK****                    05/02/03 14:40:48 PFOCHTER     8
SUSP, GREG, IS NOW NUDE, IN GREG'S APT, W/ 05/02/03 14:41:15 PFOCHTER    8
  BLEEDING ARMS                           05/02/03 14:41:22 PFOCHTER     8
473164 split to 473175 (MED) by PFOCHTER. 05/02/03 14:41:25 *            8
SUSP IS IN HIS OWN APT NOW, TEARING UP APT**** 05/02/03 14:41:58 PFOCHTER 8
Call 473173 has been linked to call 473164. 05/02/03 14:42:12 PHUGHESA    2
4A61 CODE 3...                            05/02/03 14:42:24 PHUGHESA     2
***SUSP NOW BLEEDING FROM ABDOMINAL AREA***** 05/02/03 14:42:41 PFOCHTER 8
OFCRS ON SCENE, LINE RELEASED             05/02/03 14:45:34 PFOCHTER     8
CODE 1.....                               05/02/03 14:47:48 PHUGHESA     2
64 CODE 3....                             05/02/03 14:48:09 PHUGHESA     2
 NE CORNER OF COMPLEX.. BROKEN WINDOW..   05/02/03 14:48:18 PHUGHESA     2
LOOD ON WALL..                            05/02/03 14:48:21 PHUGHESA     2
 OOD ON DOOR, LOTS OF BELONGINGS OUTSIDE, 05/02/03 14:48:42 PHUGHESA     2
KIDS RAN FROM THE SCENE...                05/02/03 14:49:06 PHUGHESA     2
INSIDE IN THE HOUSE ACTING                05/02/03 14:49:16 PHUGHESA     2
VERY BIZARRE....                          05/02/03 14:49:22 PHUGHESA     2
IN EAST BEDROOM.. TALKING TO OFC THRU WINDOW 05/02/03 14:49:45 PHUGHESA  2
```

BLEEDING FROM ARM..	05/02/03 14:49:54	PHUGHESA	2
05 CODE 3....KICKING DOOR IN...	05/02/03 14:50:39	PHUGHESA	2
414 4A02 CODE 3...	05/02/03 14:52:35	PHUGHESA	2
64 STS HE NEEDS MORE PEOPLE	05/02/03 14:52:56	PHUGHESA	2
SED MEDICAL INSIDE...	05/02/03 14:53:11	PHUGHESA	2
SGT GRIMES NOTIFIED	05/02/03 14:53:22	PHUGHESA	2
CLR CODE 1.. SEEM TO BE CODE 4.. POSS	05/02/03 15:03:49	PHUGHESA	2
3 OFFICERS INJURED...	05/02/03 15:03:52	PHUGHESA	2
SUSP DECEASED....	05/02/03 15:09:18	PHUGHESA	2
4A14 ENROUT ;MEMO	05/02/03 15:10:32	PHUGHESA	2
COMM SUPERVISOR ROBERT FORD NOTIFIED	05/02/03 15:11:34	PHUGHESA	2
Call 473105 has been linked to call 473164.	05/02/03 15:11:59	PHUGHESA	2
GOING TO PENROSE COMM...	05/02/03 15:14:45	PHUGHESA	2
PAGING MAJOR CRIMES...	05/02/03 15:34:40	PHUGHESA	2
SGT GARCIA WILL CALL 4P08	05/02/03 15:36:47	PHUGHESA	2
POSS PULSE ON SUSP PER 4A14	05/02/03 15:45:53	PHUGHESA	2
NOTIFY IA.. CALL	05/02/03 15:46:04	PHUGHESA	2
PULSE HAS STOPPED...DOA.. 1546HRS....	05/02/03 15:47:11	PHUGHESA	2
REQUESTING LAB...	05/02/03 15:50:17	PHUGHESA	2
4A61 ENROUT ;MEMO	05/02/03 15:51:13	PHUGHESA	2
HAVE LAB TEAM GO TO PENROSE COMMUNITY	05/02/03 15:51:40	PHUGHESA	2
4A64 ENROUT ;POC	05/02/03 15:52:36	PHUGHESA	2
INTERNAL AFFAIRS WILL BE CALLING 4P08	05/02/03 15:53:53	PHUGHESA	2
LIC/KCH9809 LIS/CO LIY/03 LIT/PC	05/02/03 15:55:22	PSUNADCL	4A05
LIC/KCH3263 LIS/CO LIY/03 LIT/PC	05/02/03 15:55:39	PSUNADCL	4A05
LIC/KCH9809	05/02/03 15:56:27	PHUGHESA	2
TAG COMES BK TO A STEAL ON A 96 FORD 4DR	05/02/03 15:57:21	PHUGHESA	2
SILVER....OCA/036543..	05/02/03 15:57:47	PHUGHESA	2
OWNER IS JOHN SWETMAN..4415 MELVILLE DR..	05/02/03 15:58:31	PHUGHESA	2
PHONE 3908090	05/02/03 15:58:46	PHUGHESA	2
ED 4P11 TO GO TO MEMO....	05/02/03 16:02:15	PHUGHESA	2
P11 ENROUT ;MEMO	05/02/03 16:03:12	PHUGHESA	2
05 ENROUT ;POC	05/02/03 16:03:22	PHUGHESA	2
I50 IS ENRT..	05/02/03 16:12:54	PHUGHESA	2
1X09 AT MEMO	05/02/03 16:14:44	PHUGHESA	2
1I61 ENRT TO GRANTSVILLE	05/02/03 16:17:15	PHUGHESA	2
1X08 AT MEMORIAL	05/02/03 16:18:18	PHUGHESA	2
1X08 ENRT TO GRANTSVILLE ADDRESS	05/02/03 16:23:58	PHUGHESA	2
PICKUP ON STOLEN VEH CANCELLED PER JUDY IN	05/02/03 16:31:09	PHUGHESA	2
RECORDS/ID PER 4A71	05/02/03 16:31:09	PHUGHESA	2
1I50 ON SCENE	05/02/03 16:33:48	PHUGHESA	2
1I52 ENRT	05/02/03 16:35:38	PHUGHESA	2
1X52 AT PEN COMM	05/02/03 16:41:34	PHUGHESA	2
1I61 ON SCENE	05/02/03 16:47:50	PHUGHESA	2
NAM/HERRING, GREGORY DOB/012466 SEX/M OLS/CO	05/02/03 16:48:22	PJEFFCJA	4A02
1X50 ON SCENE	05/02/03 16:59:47	PHUGHESA	2
Location changed from "5430 GRANTSVILLE GV #I202" to "5414 GRANTSVILLE GV #J101".	05/02/03 17:44:10	PMARIASH	9
NEED UNIT TO RELIEVE 4A02	05/02/03 17:49:12	PHUGHESA	2
4A16 ENROUT	05/02/03 17:51:40	PHUGHESA	2
WILL NEED UNIT TO RELIEVE 4A71	05/02/03 17:53:02	PHUGHESA	2
PAGING CORONER PER 1X09	05/02/03 18:02:13	PHUGHESA	2
CORONER SCOTT WILL CALL 1X09	05/02/03 18:06:17	PHUGHESA	2
1I61 CLR FROM SCENE	05/02/03 18:23:44	PHUGHESA	2
INVESTIGATION HANDLED BY MAJOR CRIMES	05/02/03 18:32:06	PDARREGA	4A61
4P11 ENROUT ;POC	05/02/03 18:33:46	PHUGHESA	2
4A61 ENROUT ;POC	05/02/03 18:33:58	PHUGHESA	2
4A05 ENROUT ;PEN COMM	05/02/03 18:42:03	PHUGHESA	2
11 ENROUT ;FALCON	05/02/03 19:00:03	PHUGHESA	2
A05 ENROUT ;GRANTSVILLE ADDRESS WITH 4A14	05/02/03 19:12:02	PHUGHESA	2
A14 ENROUT ;GRANTSVILLE ADDRESS	05/02/03 19:12:17	PHUGHESA	2
.02 ENROUT ;FALCON	05/02/03 19:14:30	PHUGHESA	2
4A64 ENROUT ;FALCON OFFSHIFT	05/02/03 19:30:04	PHUGHESA	2
4A14 ENROUT ;FALCON, EVID	05/02/03 19:39:07	PMILLEJU	9
RANDY'S ENRT	05/03/03 00:25:50	PSEAMAKE	2
... 1X07: ADV ALL IS SECURE @ RES; LOCKED UP.	05/03/03 03:20:34	PMILLEJU	9

PL00367

RP LNAME..... FNAME..... MI ADDRESS.....
DER SCOTT 5430 GRANTSVILLE GV #I202 COLORADO SPRINGS CO

ONE.....
19-596-1225
VYR MAKE.. MODEL. COLOR.. VLIC.... ST. ADDITIONAL.....
03 KCH9809 CO
03 KCH3263 CO
SEX RACE HAIR EYES HT.. WT. CLOTHING-COMMENTS.....

Date	Time	Unit	PSN	Status	Operator
05/02/03	14:35:32	4A61	88	DSPH	PHUGHESA
05/02/03	14:35:38	4A61	88	ENROUT	MDT
05/02/03	14:36:12	4A64	1038	DSPH	PHUGHESA
05/02/03	14:36:15	4A64	1038	ENROUT	PHUGHESA
05/02/03	14:36:18	4A64	1038	ENROUT	MDT
05/02/03	14:46:58	4A61	88	ARRIVD	MDT
05/02/03	14:49:17	4A05	1687	DSPH	PHUGHESA
05/02/03	14:49:37	4A05	1687	ENROUT	MDT
05/02/03	14:49:37	4A64	1038	ARRIVD	PHUGHESA
05/02/03	14:50:04	4A14	1394	DSPH	PHUGHESA
05/02/03	14:50:29	4A14	1394	ENROUT	MDT
05/02/03	14:51:05	4A14	1394	ENROUT	MDT
05/02/03	14:51:07	4A14	1394	ENROUT	MDT
05/02/03	14:51:10	4A14	1394	ENROUT	MDT
05/02/03	14:52:20	4A02	135	DSPH	PHUGHESA
05/02/03	14:52:31	4A02	135	ENROUT	MDT
05/02/03	14:56:51	4A05	1687	ARRIVD	PHUGHESA
05/02/03	14:59:08	4P08	93	DSPH	PHUGHESA
/02/03	15:00:00	4A14	1394	ARRIVD	MDT
5/02/03	15:03:57	4P08	93	ENROUT	PHUGHESA
/02/03	15:05:21	4P08	93	ENROUT	MDT
5/02/03	15:10:33	4A14	1394	ENROUT	PHUGHESA
05/02/03	15:12:49	4A71	1350	DSPH	PHUGHESA
05/02/03	15:12:50	4A71	1350	ARRIVD	PHUGHESA
05/02/03	15:20:10	4A02	135	ARRIVD	PHUGHESA
05/02/03	15:24:48	4P08	93	ARRIVD	MDT
05/02/03	15:45:40	4A14	1394	ARRIVD	PHUGHESA
05/02/03	15:51:14	4A61	88	ENROUT	PHUGHESA
05/02/03	15:52:37	4A64	1038	ENROUT	PHUGHESA
05/02/03	16:01:47	1X07	1092	DSPH	PHUGHESA
05/02/03	16:03:10	4P11	193	DSPH	PHUGHESA
05/02/03	16:03:11	4P11	193	ENROUT	PHUGHESA
05/02/03	16:03:15	4P11	193	ENROUT	PHUGHESA
05/02/03	16:03:22	4A05	1687	ENROUT	PHUGHESA
05/02/03	16:14:35	4A61	88	ARRIVD	MDT
05/02/03	16:16:51	4A61	88	ARRIVD	PHUGHESA
05/02/03	16:17:12	4A64	1038	ARRIVD	MDT
05/02/03	16:17:22	4A64	1038	ARRIVD	PHUGHESA
05/02/03	16:22:28	4P11	193	ENROUT	MDT
05/02/03	16:23:08	1X07	1092	DSPH	PHUGHESA
05/02/03	16:24:05	1X08	1352	DSPH	PHUGHESA
05/02/03	16:24:07	1X08	1352	ENROUT	PHUGHESA
05/02/03	16:24:12	1X08	1352	ENROUT	PHUGHESA
05/02/03	16:24:16	1X07	1092	ENROUT	PHUGHESA
05/02/03	16:26:22	1X13	1514	DSPH	PHUGHESA
05/02/03	16:26:25	1X13	1514	ARRIVD	PHUGHESA
/02/03	16:26:31	1X13	1514	ARRIVD	PHUGHESA
5/02/03	16:26:36	4A05	1687	ARRIVD	MDT
05/02/03	16:30:00	4P11	193	ARRIVD	PHUGHESA
/02/03	16:54:06	1X08	1352	ARRIVD	PHUGHESA
05/02/03	17:50:28	4A16	208	DSPH	PMARIASH
05/02/03	17:50:51	4A16	208	ENROUT	PHUGHESA
05/02/03	17:51:02	4A16	208	DROPPED	PHUGHESA
05/02/03	17:51:03	4A16	208	CLRAR	PHUGHESA

05/02/03	17:51:07	4A16	208	DSPH	PHUGHESA
/02/03	17:51:08	4A16	208	ENROUT	PHUGHESA
/02/03	17:51:40	4A16	208	ENROUT	PHUGHESA
/02/03	17:54:50	4A74	2169	DSPH	PMARIASH
5/02/03	17:55:21	4A74	2169	ENROUT	PHUGHESA
05/02/03	17:55:24	4A74	2169	ENROUT	MDT
05/02/03	18:07:18	4A16	208	ARRIVD	PHUGHESA
05/02/03	18:07:41	4A74	2169	ARRIVD	MDT
05/02/03	18:15:03	4A71	1350	CLEAR	PHUGHESA
05/02/03	18:24:41	4P08	93	CLEAR	PHUGHESA
05/02/03	18:32:06	4A61	88	CLEAR	MDT
05/02/03	18:33:48	4P11	193	ENROUT	PHUGHESA
05/02/03	18:33:51	4A61	88	DSPH	PHUGHESA
05/02/03	18:33:51	4A61	88	ENROUT	PHUGHESA
05/02/03	18:33:58	4A61	88	ENROUT	PHUGHESA
05/02/03	18:42:06	4A05	1687	ENROUT	PHUGHESA
05/02/03	18:42:28	4P11	193	ARRIVD	PHUGHESA
05/02/03	19:00:04	4P11	193	ENROUT	PHUGHESA
05/02/03	19:03:38	4A61	88	ARRIVD	PHUGHESA
05/02/03	19:03:40	4A05	1687	ARRIVD	MDT
05/02/03	19:10:53	4P11	193	CLEAR	PMARIASH
05/02/03	19:12:16	4A05	1687	ENROUT	PHUGHESA
05/02/03	19:12:21	4A14	1394	ENROUT	PHUGHESA
05/02/03	19:14:31	4A02	135	ENROUT	PHUGHESA
05/02/03	19:14:35	4A02	135	ARRIVD	PHUGHESA
05/02/03	19:17:04	1X08	1352	DROPPED	PHENSHRE
05/02/03	19:17:33	1X08	1352	OUT	PHENSHRE
05/02/03	19:19:55	4A05	1687	ARRIVD	MDT
05/02/03	19:26:07	4A02	135	CLEAR	MDT
05/02/03	19:30:07	4A64	1038	ENROUT	PHUGHESA
/02/03	19:39:07	4A14	1394	ARRIVD	PHUGHESA
5/02/03	19:39:10	4A14	1394	ENROUT	PMILLEJU
/02/03	19:40:08	4A14	1394	ENROUT	MDT
/02/03	19:43:37	4A64	1038	ARRIVD	MDT
05/02/03	19:53:25	4A05	1687	ARRIVD	PMILLEJU
05/02/03	19:53:31	4A14	1394	ENROUT	PMILLEJU
05/02/03	19:53:34	4A16	208	ARRIVD	PMILLEJU
05/02/03	19:56:19	4A64	1038	CLEAR	MDT
05/02/03	20:01:05	4A61	88	ARRIVD	PMILLEJU
05/02/03	20:12:14	4A14	1394	ARRIVD	MDT
05/02/03	20:15:08	4A05	1687	CLEAR	PHUGHESA
05/02/03	20:15:51	1X08	1352	DSPH	PMILLEJU
05/02/03	20:15:54	1X08	1352	ARRIVD	PMILLEJU
05/02/03	20:16:16	1X08	1352	ARRIVD	PMILLEJU
05/02/03	20:24:19	4A14	1394	ARRIVD	PMILLEJU
05/02/03	20:28:03	4A84	1869	DSPH	PMILLEJU
05/02/03	20:28:07	4A84	1869	DSPH	PMILLEJU
05/02/03	20:28:25	4A84	1869	ENROUT	MDT
05/02/03	20:28:30	4A16	208	ARRIVD	PMILLEJU
05/02/03	20:29:44	4A74	2169	ARRIVD	PMILLEJU
05/02/03	20:35:44	4A87	2300	DSPH	PMILLEJU
			997		
05/02/03	20:35:56	4A87	2300	DSPH	PMILLEJU
			997		
05/02/03	20:36:06	4A74	2169	ARRIVD	PMILLEJU
05/02/03	20:36:18	4A87	2300	ENROUT	MDT
			997		
05/02/03	20:41:50	4A84	1869	ARRIVD	MDT
/02/03	20:50:28	4A16	208	CLEAR	MDT
/02/03	20:50:32	4A87	2300	ARRIVD	MDT
			997		
/02/03	20:53:45	4A74	2169	ARRIVD	PMILLEJU
			997		
05/02/03	20:53:56	4A87	2300	ARRIVD	PMILLEJU
05/02/03	20:59:05	4A84	1869	ARRIVD	MDT
05/02/03	21:11:58	4A74	2169	ARRIVD	MDT

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997

5/02/03	21:12:43	4A74	2169	ARRIVD	MDT
5/02/03	21:13:23	4A74	2169	CLEAR	MDT
/02/03	21:18:43	4A84	1869	ARRIVD	PMILLEJU
5/02/03	21:18:44	4A87	2300	ARRIVD	PMILLEJU
05/02/03	21:45:56	4A14	1394	CLEAR	PMILLEJU
05/02/03	21:58:21	4A88	2139	DSPH	PMILLEJU
05/02/03	21:58:30	4A88	2139	DSPH	PMILLEJU
05/02/03	21:59:21	4A88	2139	ENROUT	MDT
05/02/03	22:12:06	1X07	1092	ARRIVD	PMILLEJU
05/02/03	22:14:20	4A88	2139	ARRIVD	PMILLEJU
05/02/03	22:19:12	4A84	1869	CLEAR	MDT
05/02/03	22:37:14	4A88	2139	ARRIVD	MDT
05/02/03	23:40:22	4A88	2139	ARRIVD	MDT
05/03/03	00:49:47	4A88	2139	ARRIVD	PMILLEJU
05/03/03	01:18:36	4A61	88	CLEAR	PMILLEJU
05/03/03	02:38:36	4A87	2300	CLEAR	PMILLEJU
05/03/03	02:38:49	4A88	2139	ARRIVD	PMILLEJU
05/03/03	03:10:26	1X07	1092	OFFDTY	PSEAMAKE
05/03/03	03:10:29	1X08	1352	CLEAR	PSEAMAKE
05/03/03	03:10:35	1X13	1514	OFFDTY	PSEAMAKE
05/03/03	03:32:09	4A88	2139	CLEAR	MDT

One record listed.

```
all 473164      File              Date 05/02/2003 Opr PFOCHTER |CN. Unit. Status
ocation 5430 GRANTSVILLE GV #I202                  Juris COS   |  FALCON PATROL
 e DIST   Svc P Agcy CSPD Area 4    Dist 4300 Zn P4 Bt 49     |164  4A02 ARRIVD
 arks (DISTURBANCE)                        IP? Y Pty 1 How? 9 |153  4A03 ARRIVD
01  RP STATES NGBR IS BANGING ON FRONT DOOR, TRYING T 14:34:05 |164  4A05 ARRIVD
02    TO POSSIBLY GET INSIDE                         14:34:11 |035  4A11 ARRIVD
03  RP IS IN HOUSE, SUSP OUTSIDE RIGHT NOW           14:34:25 |035  4A12 ARRIVD
04  NO WEAP                                          14:34:30 |164  4A14 ARRIVD
05+ VERBAL                                           14:34:34 |915  4A21 ARRIVD
 Last ELDER          First SCOTT          Phone 719-596-1225  |139  4A22 ARRIVD
 Address 5430 GRANTSVILLE GV #I202 COLORADO SPRINGS CO        |212  4A24 ENROUT
 Cross Streets          Rec  POD B   BOLO Y HAZ N EL N PH 0   |     4A31 OUT
01  5400 CHARLOTTE PY  01  4A61 4A41                          |035  4A32 ARRIVD
02  6000 STETSON HILLS                                       |035  4A34 ARRIVD
                                                             |173  4A41 ARRIVD
                                                             |245  4A42 ENROUT
                                                             |069  4A44 ENROUT
                                                             |180  4A51 ENROUT
                                                             |     4A54 OUT
                                                             |164  4A61 ARRIVD
 UNIT  NAME            RCVD DISP ARVD CLRD CLS Backup Units  |
 4A61  DARRESS G D     1433 1435 1446          4A64/4A05/4A14/|Su:   0 P3:  23
                                                             |P1:   1 P4:   3
CMD:                                                         |P2:   0
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PL00371

449a

Remarks Detail for Call 473164 page 1 of 3

	Remarks	Date. Time....	Operator	POD
	'P STATES NGBR IS BANGING ON FRONT DOOR, TRYING	05/02 14:34:05	PFOCHTER	8
	TO POSSIBLY GET INSIDE	05/02 14:34:11	PFOCHTER	8
3	RP IS IN HOUSE, SUSP OUTSIDE RIGHT NOW	05/02 14:34:25	PFOCHTER	8
4	NO WEAP	05/02 14:34:30	PFOCHTER	8
5	VERBAL	05/02 14:34:34	PFOCHTER	8
6	UNK IF SUSP IS AT DOOR NOW OR NOT	05/02 14:34:45	PFOCHTER	8
7	SUSP;NAM/GREGG, BM 35YO 602 240 SHRT BLK HAIR	05/02 14:35:07	PFOCHTER	8
8	LSW UNK CLOTHING	05/02 14:35:40	PFOCHTER	8
9	NO INJ	05/02 14:36:11	PFOCHTER	8
10	SUSP NOT AT FRONT DOOR NOW,	05/02 14:36:16	PFOCHTER	8
11	SUSP LIVES IN APT JUST NORTH OF RP'S	05/02 14:36:36	PFOCHTER	8
12	KIDS NOW RUNNING AWAY FROM APT, CONTAINERS AND	05/02 14:36:51	PFOCHTER	8
13	FURNITURE BEING THROWN OUT OF THE APARTMENT	05/02 14:37:00	PFOCHTER	8
14	UNK ETOH/DRUGS	05/02 14:37:11	PFOCHTER	8
15	113D2	05/02 14:37:30	PFOCHTER	8
16	***RP CALLING BACK****	05/02 14:40:48	PFOCHTER	8
17	SUSP, GREG, IS NOW NUDE, IN GREG'S APT, W/	05/02 14:41:15	PFOCHTER	8
18	BLEEDING ARMS	05/02 14:41:22	PFOCHTER	8
19	473164 split to 473175 (MED) by PFOCHTER.	05/02 14:41:25	*	8

Show Remarks:

Remarks Detail for Call 473164 page 2 of 3

	Remarks	Date. Time....	Operator	POD
	USP IS IN HIS OWN APT NOW, TEARING UP APT****	05/02 14:41:58	PFOCHTER	8
	Call 473173 has been linked to call 473164.	05/02 14:42:12	PHUGHESA	2
22	4A61 CODE 3...	05/02 14:42:24	PHUGHESA	2
23	***SUSP NOW BLEEDING FROM ABDOMINAL AREA*****	05/02 14:42:41	PFOCHTER	8
24	OFCRS ON SCENE, LINE RELEASED	05/02 14:45:34	PFOCHTER	8
25	CODE 1.....	05/02 14:47:48	PHUGHESA	2
26	4A64 CODE 3....	05/02 14:48:09	PHUGHESA	2
27	IN NE CORNER OF COMPLEX.. BROKEN WINDOW..	05/02 14:48:18	PHUGHESA	2
28	BLOOD ON WALL..	05/02 14:48:21	PHUGHESA	2
29	BLOOD ON DOOR, LOTS OF BELONGINGS OUTSIDE,	05/02 14:48:42	PHUGHESA	2
30	KIDS RAN FROM THE SCENE...	05/02 14:49:06	PHUGHESA	2
31	INSIDE IN THE HOUSE ACTING	05/02 14:49:16	PHUGHESA	2
32	VERY BIZARRE....	05/02 14:49:22	PHUGHESA	2
33	IN EAST BEDROOM.. TALKING TO OFC THRU WINDOW	05/02 14:49:45	PHUGHESA	2
34	BLEEDING FROM ARM..	05/02 14:49:54	PHUGHESA	2
35	4A05 CODE 3....KICKING DOOR IN...	05/02 14:50:39	PHUGHESA	2
36	4A14 4A02 CODE 3...	05/02 14:52:35	PHUGHESA	2
37	4A64 STS HE NEEDS MORE PEOPLE	05/02 14:52:56	PHUGHESA	2
38	NEED MEDICAL INSIDE...	05/02 14:53:11	PHUGHESA	2

Show Remarks:

Remarks Detail for Call 473164 page 3 of 3

#	Remarks	Date. Time....	Operator	POD
3'	7T GRIMES NOTIFIED	05/02 14:53:22	PHUGHESA	2
	:LR CODE 1.. SEEM TO BE CODE 4.. POSS	05/02 15:03:49	PHUGHESA	2
41	3 OFFICERS INJURED...	05/02 15:03:52	PHUGHESA	2
42	SUSP DECEASED....	05/02 15:09:18	PHUGHESA	2
43	4A14 ENROUT ;MEMO	05/02 15:10:32	PHUGHESA	2
44	COMM SUPERVISOR ROBERT FORD NOTIFIED	05/02 15:11:34	PHUGHESA	2
45	Call 473105 has been linked to call 473164.	05/02 15:11:59	PHUGHESA	2
46	GOING TO PENROSE COMM...	05/02 15:14:45	PHUGHESA	2
47	PAGING MAJOR CRIMES...	05/02 15:34:40	PHUGHESA	2
48	SGT GARCIA WILL CALL 4P08	05/02 15:36:47	PHUGHESA	2
49	POSS PULSE ON SUSP PER 4A14	05/02 15:45:53	PHUGHESA	2
50	NOTIFY IA.. CALL	05/02 15:46:04	PHUGHESA	2
51	PULSE HAS STOPPED...DOA.. 1546HRS....	05/02 15:47:11	PHUGHESA	2

Show Remarks:

ne record selected.

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[2J[H05-08-03                          PRINT CALL HISTORY                          PAGE 1
CAD.FILE.BACKUP. 473170
DR.............. C0313581
DATE............ 05/02/03
RCVD............ 14:37:10
Dispatcher...... PALFANCO
LOCATION........ 6134 ROMLEY PT; WINFIELD APARTMENTS
TYPE............  21B1
CALL TYPE DESC.. BLEEDING POSSIBLE DANGEROUS
                 AREA
SERVICE......... F
AGENCY.......... CSFD
AREA............ 82
                 58
DIST............
ZONE............ F2
Beat............
CENSUS}TRACT#... 40
PDZ.............
IP.............. Y
PRIO}RITY....... 1
}OW............. 9
}D.............  12
DISPO..........
  MARKS..................................... DATE.... TIME.... OPERATOR POD.
ANFIELD APARTMENTS [BUSN]                 05/02/03 14:37:10 !E911       12
Location changed from "6134 ROMLEY PT;    05/02/03 14:37:52 PALFANCO    12
WINFIELD APARTMENTS" to "DANVILLE CT/ROMLEY
PT; 5414 ROMLEY PT #I101".
Location changed from "DANVILLE CT/ROMLEY PT; 05/02/03 14:38:18 PALFANCO  12
5414 ROMLEY PT #I101" to "6134 ROMLEY PT;
WINFIELD APARTMENTS".
COMING FROM BUILDING NUMBER 5414 ROMLEY PT  05/02/03 14:38:31 PALFANCO    12
#I101 CAD WOULD NOT TAKE ADDRESS            05/02/03 14:38:41 PALFANCO    12
MALE WALKING AROUND APT COMPLEX NAKED       05/02/03 14:39:26 PALFANCO    12
WITH GASH IN ARM                            05/02/03 14:39:29 PALFANCO    12
473170 split to 473173 (DIST) by PALFANCO.  05/02/03 14:39:31 *           12
Call type changed from "MED" to "9E5".      05/02/03 14:39:41 PALFANCO     0
Suffocation                                 05/02/03 14:39:41 PALFANCO     0

You are responding to a patient in apparent 05/02/03 14:39:41 PALFANCO     0
cardiac (respiratory) arrest.               05/02/03 14:39:41 PALFANCO     0

Call type changed from "9E5" to "21B1".     05/02/03 14:40:12 PALFANCO     0
Suffocation                                 05/02/03 14:40:12 PALFANCO     0

You are responding to a patient who is      05/02/03 14:40:12 PALFANCO     0
hemorrhaging.  The patient is a 30-year-old 05/02/03 14:40:12 PALFANCO     0
male,
who is conscious and breathing.             05/02/03 14:40:12 PALFANCO     0

MALE IS RUNNING AROUND THE APT COMPLEX BEATING 05/02/03 14:40:37 PALFANCO  12
ON PEOPLES DOORS                            05/02/03 14:40:40 PALFANCO    12
  ILDREN IN APT #I101 ARE SCREAMING         05/02/03 14:40:51 PALFANCO    12
FRANTICALLY
UNK HOW SUBJ GOT THE CUT ON HIS ARM         05/02/03 14:41:00 PALFANCO    12
UNK WEAPS                                   05/02/03 14:41:05 PALFANCO    12
*** AMR NTFD **                             05/02/03 14:41:07 PDURANHI     7
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PL00375

453a

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SUBJ NAM/GREG HERRING/BM/30'S/603                    05/02/03 14:41:20 PALFANCO   12
AVY BUILD/DRK HAIR                                   05/02/03 14:41:27 PALFANCO   12
BJ IS WALKING AROUND BUILDING 5414                   05/02/03 14:41:37 PALFANCO   12
 ILDREN IN APT ARE SUBJS KIDS                        05/02/03 14:41:52 PALFANCO   12
 JBJ DOES HAVE THREE CHILDREN AGES OF 8-12           05/02/03 14:42:01 PALFANCO   12
NO ALCH DRUGS                                        05/02/03 14:42:08 PALFANCO   12
Call 473170 has been linked to call 473175.          05/02/03 14:45:47 PFORDRO     6
***FEMALE W/E17 WANTS TO SHOW PD WHERE THE           05/02/03 14:52:06 PFORDRO     6
SUSP
IS HIDEING                                           05/02/03 14:52:06 PFORDRO     6
CALLING RP BACK....NO NASWER                         05/02/03 14:58:48 PHENSOBA    9
E17 TOD TO MEMO                                      05/02/03 15:31:15 PCHAVECO    6
E17 TOD TO COMMMUNITY                                05/02/03 15:37:50 PCHAVECO    6
4A41 ENROUT ;POC                                     05/02/03 15:52:50 PHUGHESA    2
4A84 ENROUT ;POC                                     05/02/03 17:33:30 PHUGHESA    2
4A41 ENROUT ;FALCON                                  05/02/03 19:15:24 PMARIASH    9
RP LNAME..... FNAME..... MI ADDRESS.....
SPICKERMAN          LISA             6134 ROMLEY PT COLORADO SPRINGS CO
PHONE.....
719-380-1580
VYR MAKE.. MODEL. COLOR.. VLIC.... ST. ADDITIONAL.....

SEX RACE HAIR EYES HT.. WT. CLOTHING-COMMENTS.....

  Date      Time     Unit  PSN   Status    Operator
-------- -------- ------ ---- -------- ------------
05/02/03 14:40:34 E17          DSPTCH   PFORDRO
05/02/03 14:41:40 E17          RESPND   CDOMC2
05/02/03 14:49:09 E17          ARRIVD   CDOMC2
05/02/03 15:31:03 E17          TOD      PCHAVECO
05/02/03 16:06:49 E17          BIS      CDOMC2

One record listed.
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ne record selected.

[2J[H05-05-03 PRINT CALL HISTORY PAGE 1
CAD.FILE.BACKUP. 473173
DR.....
DATE..... 05/02/03
RCVD..... 14:39:31
Dispatcher..... PALFANCO
LOCATION..... 6134 ROMLEY PT; WINFIELD APARTMENTS
TYPE..... DIST
CALL TYPE DESC.. DISTURBANCE
SERVICE..... P
AGENCY..... CSPD
AREA..... 4
DIST..... 4300
ZONE..... P4
Beat..... 49
CENSUS]TRACT#... 40
PDZ.....
IP..... Y
PRIO]RITY..... 1
HOW..... 9
POD..... 12
DISPO..... NO ACTION

REMARKS	DATE....	TIME....	OPERATOR	POD.
WINFIELD APARTMENTS [BUSN]	05/02/03	14:37:10	!E911	12
cation changed from "6134 ROMLEY PT;	05/02/03	14:37:52	PALFANCO	12
WINFIELD APARTMENTS" to "DANVILLE CT/ROMLEY PT; 5414 ROMLEY PT #I101".				
Location changed from "DANVILLE CT/ROMLEY PT; 5414 ROMLEY PT #I101" to "6134 ROMLEY PT; WINFIELD APARTMENTS".	05/02/03	14:38:18	PALFANCO	12
COMING FROM BUILDING NUMBER 5414 ROMLEY PT	05/02/03	14:38:31	PALFANCO.	12
#I101 CAD WOULD NOT TAKE ADDRESS	05/02/03	14:38:41	PALFANCO	12
MALE WALKING AROUND APT COMPLEX NAKED	05/02/03	14:39:26	PALFANCO	12
WITH GASH IN ARM	05/02/03	14:39:29	PALFANCO	12
473173 split from 473170 (MED) by PALFANCO.	05/02/03	14:39:31	*	12
MALE IS RUNNING AROUND THE APT COMPLEX BEATING ON PEOPLES DOORS	05/02/03	14:40:37	PALFANCO	12
	05/02/03	14:40:40	PALFANCO	12
CHILDREN IN APT #I101 ARE SCREAMING FRANTICALLY	05/02/03	14:40:51	PALFANCO	12
UNK HOW SUBJ GOT THE CUT ON HIS ARM	05/02/03	14:41:00	PALFANCO	12
UNK WEAPS	05/02/03	14:41:05	PALFANCO	12
*** AMR NTFD **	05/02/03	14:41:07	PDURANHI	7
SUBJ NAM/GREG HERRING/BM/30'S/603	05/02/03	14:41:20	PALFANCO	12
HEAVY BUILD/DRK HAIR	05/02/03	14:41:27	PALFANCO	12
SUBJ IS WALKING AROUND BUILDING 5414	05/02/03	14:41:37	PALFANCO	12
CHILDREN IN APT ARE SUBJS KIDS	05/02/03	14:41:52	PALFANCO	12
SUBJ DOES HAVE THREE CHILDREN AGES OF 8-12	05/02/03	14:42:01	PALFANCO	12
NO ALCH DRUGS	05/02/03	14:42:08	PALFANCO	12
Call 473173 has been linked to call 473164.	05/02/03	14:42:12	PHUGHESA	2
***FEMALE W/E17 WANTS TO SHOW PD WHERE THE SUSP IS HIDEING	05/02/03	14:52:06	PFORDRO	6
	05/02/03	14:52:06	PFORDRO	6
CALLING RP BACK....NO NASWER	05/02/03	14:58:48	PHENSOBA	9
7 TOD TO MEMO	05/02/03	15:31:15	PCHAVECO	6
A17 TOD TO COMMMUNITY	05/02/03	15:37:50	PCHAVECO	6
4A41 ENROUT ;POC	05/02/03	15:52:50	PHUGHESA	2
4A84 ENROUT ;POC	05/02/03	17:33:30	PHUGHESA	2
4A41 ENROUT ;PALCON	05/02/03	19:15:24	PMARIASH	9

PL00377
455a

CLEAR 05/02/03 20:01:06 PAMBUEBR 4A41
LNAME..... FNAME..... MI ADDRESS.....
ICKERMAN LISA 6134 ROMLEY PT COLORADO SPRINGS CO
ONE.....
19-380-1580
VYR MAKE.. MODEL. COLOR.. VLIC.... ST. ADDITIONAL.....

SEX RACE HAIR EYES HT.. WT. CLOTHING-COMMENTS.....

Date	Time	Unit	PSN	Status	Operator
05/02/03	14:40:15	4A41	2294	DSPH	PHUGHESA
05/02/03	14:40:23	4A41	2294	ENROUT	MDT
05/02/03	14:41:00	4A84	1869	DSPH	PHUGHESA
05/02/03	14:41:16	4A84	1869	ENROUT	MDT
05/02/03	14:53:19	4A84	1869	ARRIVD	MDT
05/02/03	15:04:14	4A41	2294	ARRIVD	PHUGHESA
05/02/03	15:52:52	4A41	2294	ENROUT	PHUGHESA
05/02/03	16:17:43	4A41	2294	ARRIVD	PHUGHESA
05/02/03	17:33:32	4A84	1869	ENROUT	PHUGHESA
05/02/03	17:36:41	4A84	1869	ENROUT	MDT
05/02/03	18:17:35	4A84	1869	ARRIVD	PHUGHESA
05/02/03	19:15:26	4A41	2294	ENROUT	PMARIASH
05/02/03	19:30:35	4A84	1869	CLEAR	PHUGHESA
05/02/03	20:00:43	4A41	2294	ARRIVD	MDT
05/02/03	20:01:06	4A41	2294	CLEAR	MDT

One record listed.

record selected

[2J[H05-07-03 PRINT CALL HISTORY PAGE 1
CAD.FILE.BACKUP. 473175
DR.....
DATE..... 05/02/03
RCVD..... 14:41:25
Dispatcher..... PFOCHTER
LOCATION..... 5430 GRANTSVILLE GV #I202
TYPE..... 30B1
CALL TYPE DESC.. TRAUMA INJ POSS DANGER BODY AREA
SERVICE..... F
AGENCY..... CSFD
AREA..... 82
58
DIST.....
ZONE..... F2
Beat.....
CENSUS}TRACT#... 40
PDZ.....
IP..... Y
PRIO}RITY..... 1
HOW..... 9
POD..... 8
SPO.....

REMARKS	DATE	TIME	OPERATOR	POD
.STATES NGBR IS BANGING ON FRONT DOOR,	05/02/03	14:34:05	PFOCHTER	8
ING T				
TO POSSIBLY GET INSIDE	05/02/03	14:34:11	PFOCHTER	8
RP IS IN HOUSE, SUSP OUTSIDE RIGHT NOW	05/02/03	14:34:25	PFOCHTER	8
NO WEAP	05/02/03	14:34:30	PFOCHTER	8
VERBAL	05/02/03	14:34:34	PFOCHTER	8
UNK IF SUSP IS AT DOOR NOW OR NOT	05/02/03	14:34:45	PFOCHTER	8
SUSP;NAM/GREGG, BM 35YO 602 240 SHRT BLK HAIR	05/02/03	14:35:07	PFOCHTER	8
LSW UNK CLOTHING	05/02/03	14:35:40	PFOCHTER	8
NO INJ	05/02/03	14:36:11	PFOCHTER	8
SUSP NOT AT FRONT DOOR NOW,	05/02/03	14:36:16	PFOCHTER	8
SUSP LIVES IN APT JUST NORTH OF RP'S	05/02/03	14:36:36	PFOCHTER	8
KIDS NOW RUNNING AWAY FROM APT, CONTAINERS AND	05/02/03	14:36:51	PFOCHTER	8
FURNITURE BEING THROWN OUT OF THE APARTMENT	05/02/03	14:37:00	PFOCHTER	8
UNK ETOH/DRUGS	05/02/03	14:37:11	PFOCHTER	8
113D2	05/02/03	14:37:30	PFOCHTER	8
RP CALLING BACK*	05/02/03	14:40:48	PFOCHTER	8
SUSP, GREG, IS NOW NUDE, IN GREG'S APT, W/	05/02/03	14:41:15	PFOCHTER	8
BLEEDING ARMS	05/02/03	14:41:22	PFOCHTER	8
473175 split from 473164 (DIST) by PFOCHTER.	05/02/03	14:41:25	*	8
SUSP IS IN HIS OWN APT NOW, TEARING UP APT****	05/02/03	14:41:58	PFOCHTER	8
4A61 CODE 3...	05/02/03	14:42:24	PHUGHESA	2
SUSP NOW BLEEDING FROM ABDOMINAL AREA**	05/02/03	14:42:41	PFOCHTER	8
Call type changed from "MED" to "30B1".	05/02/03	14:42:58	PFOCHTER	0
TRAUMATIC INJURY	05/02/03	14:42:58	PFOCHTER	0
ou are responding to a patient with	05/02/03	14:42:58	PFOCHTER	0
pecifically				
dentified traumatic injuries. The patient is	05/02/03	14:42:58	PFOCHTER	0
year-old male, who is conscious and	05/02/03	14:42:58	PFOCHTER	0
eathing.				
The caller is not with the patient.	05/02/03	14:42:28	PFOCHTER	0

PL00379

457a

:He is completely awake (alert).	05/02/03 14:42:32	PFOCHTER 0
:He is breathing normally.	05/02/03 14:42:52	PFOCHTER 0
injury is POSSIBLY DANGEROUS.	05/02/03 14:42:58	PFOCHTER 0
ere is SERIOUS bleeding.	05/02/03 14:43:00	PFOCHTER 0
s happened now (less than 6 hours ago).	05/02/03 14:43:03	PFOCHTER 0
RS ON SCENE, LINE RELEASED	05/02/03 14:45:34	PFOCHTER 8
Call 473170 has been linked to call 473175.	05/02/03 14:45:47	PFORDRO 6
Cancelled by PFORDRO (6) at 14:45:57 on 05/02/2003.	05/02/03 14:45:57	PFORDRO 6
DUP	05/02/03 14:45:57	PFORDRO 6
CODE 1.....	05/02/03 14:47:48	PHUGHESA 2
4A64 CODE 3....	05/02/03 14:48:09	PHUGHESA 2
IN NE CORNER OF COMPLEX.. BROKEN WINDOW..	05/02/03 14:48:18	PHUGHESA 2
BLOOD ON WALL..	05/02/03 14:48:21	PHUGHESA 2
BLOOD ON DOOR, LOTS OF BELONGINGS OUTSIDE,	05/02/03 14:48:42	PHUGHESA 2
KIDS RAN FROM THE SCENE...	05/02/03 14:49:06	PHUGHESA 2
INSIDE IN THE HOUSE ACTING	05/02/03 14:49:16	PHUGHESA 2
VERY BIZARRE....	05/02/03 14:49:22	PHUGHESA 2
IN EAST BEDROOM.. TALKING TO OFC THRU WINDOW	05/02/03 14:49:45	PHUGHESA 2
BLEEDING FROM ARM..	05/02/03 14:49:54	PHUGHESA 2
4A05 CODE 3....KICKING DOOR IN...	05/02/03 14:50:39	PHUGHESA 2
4A15 4A02 CODE 3...	05/02/03 14:52:28	PHUGHESA 2
4A14 4A02 CODE 3...	05/02/03 14:52:35	PHUGHESA 2
4A64 STS HE NEEDS MORE PEOPLE	05/02/03 14:52:56	PHUGHESA 2
NEED MEDICAL INSIDE...	05/02/03 14:53:11	PHUGHESA 2
SGT GRIMES NOTIFIED	05/02/03 14:53:22	PHUGHESA 2
CLR CODE 1.. SEEM TO BE CODE 4.. POSS	05/02/03 15:03:49	PHUGHESA 2
3 OFFICERS INJURED...	05/02/03 15:03:52	PHUGHESA 2
SUSP DECEASED....	05/02/03 15:09:18	PHUGHESA 2
4A14 ENROUT ;MEMO	05/02/03 15:10:32	PHUGHESA 2
OMM SUPERVISOR ROBERT FORD NOTIFIED	05/02/03 15:11:34	PHUGHESA 2
NG TO PENROSE COMM...	05/02/03 15:14:45	PHUGHESA 2
AGING MAJOR CRIMES...	05/02/03 15:34:40	PHUGHESA 2
GARCIA WILL CALL 4P08	05/02/03 15:36:47	PHUGHESA 2
S PULSE ON SUSP PER 4A14	05/02/03 15:45:53	PHUGHESA 2
OTIFY IA.. CALL	05/02/03 15:46:04	PHUGHESA 2
PULSE HAS STOPPED...DOA.. 1546HRS....	05/02/03 15:47:11	PHUGHESA 2
REQUESTING LAB...	05/02/03 15:50:17	PHUGHESA 2
4A61 ENROUT ;MEMO	05/02/03 15:51:13	PHUGHESA 2
HAVE LAB TEAM GO TO PENROSE COMMUNITY	05/02/03 15:51:40	PHUGHESA 2
4A64 ENROUT ;POC	05/02/03 15:52:36	PHUGHESA 2
INTERNAL AFFAIRS WILL BE CALLING 4P08	05/02/03 15:53:53	PHUGHESA 2
LIC/KCH9809	05/02/03 15:56:27	PHUGHESA 2
TAG COMES BK TO A STEAL ON A 96 FORD 4DR	05/02/03 15:57:21	PHUGHESA 2
SILVER....OCA/036543..	05/02/03 15:57:47	PHUGHESA 2
OWNER IS JOHN SWETMAN..4415 MELVILLE DR..	05/02/03 15:58:31	PHUGHESA 2
PHONE 3908090	05/02/03 15:58:46	PHUGHESA 2
NEED 4P11 TO GO TO MEMO....	05/02/03 16:02:15	PHUGHESA 2
4P11 ENROUT ;MEMO	05/02/03 16:03:12	PHUGHESA 2
4A05 ENROUT ;POC	05/02/03 16:03:22	PHUGHESA 2
1I50 IS ENRT..	05/02/03 16:12:54	PHUGHESA 2
1X09 AT MEMO	05/02/03 16:14:44	PHUGHESA 2
1I61 ENRT TO GRANTSVILLE	05/02/03 16:17:15	PHUGHESA 2
1X08 AT MEMORIAL	05/02/03 16:18:18	PHUGHESA 2
1X08 ENRT TO GRANTSVILLE ADDRESS	05/02/03 16:23:58	PHUGHESA 2
PICKUP ON STOLEN VEH CANCELLED PER JUDY IN	05/02/03 16:31:09	PHUGHESA 2
RECORDS/ID PER 4A71	05/02/03 16:31:09	PHUGHESA 2
1I50 ON SCENE	05/02/03 16:33:48	PHUGHESA 2
1I52 ENRT	05/02/03 16:35:38	PHUGHESA 2
X52 AT PEN COMM	05/02/03 16:41:34	PHUGHESA 2
I61 ON SCENE	05/02/03 16:47:50	PHUGHESA 2
X50 ON SCENE	05/02/03 16:59:47	PHUGHESA 2
ED UNIT TO RELIEVE 4A02	05/02/03 17:49:12	PHUGHESA 2
16 ENROUT	05/02/03 17:51:40	PHUGHESA 2
LL NEED UNIT TO RELIEVE 4A71	05/02/03 17:53:02	PHUGHESA 2
PAGING CORONER PER 1X09	05/02/03 18:02:13	PHUGHESA 2

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CORONER SCOTT WILL CALL 1X09                    05/02/03 18:06:17 PHUGHESA    2
1I61 CLR FROM SCENE                             05/02/03 18:23:44 PHUGHESA    2
[illegible] ENROUT ;POC                         05/02/03 18:33:46 PHUGHESA    2
[illegible] ENROUT ;POC                         05/02/03 18:33:58 PHUGHESA    2
[illegible] ENROUT ;PEN COMM                    05/02/03 18:42:03 PHUGHESA    2
   1 ENROUT ;FALCON                             05/02/03 19:00:03 PHUGHESA    2
[illegible]05 ENROUT ;GRANTSVILLE ADDRESS WITH 4A14 05/02/03 19:12:02 PHUGHESA    2
4A14 ENROUT ;GRANTSVILLE ADDRESS                05/02/03 19:12:17 PHUGHESA    2
4A02 ENROUT ;FALCON                             05/02/03 19:14:30 PHUGHESA    2
4A64 ENROUT ;FALCON OFFSHIFT                    05/02/03 19:30:04 PHUGHESA    2
4A14 ENROUT ;FALCON, EVID                       05/02/03 19:39:07 PMILLEJU    9
RANDY'S ENRT                                    05/03/03 00:25:50 PSEAMAKE    2
... 1X07: ADV ALL IS SECURE @ RES; LOCKED UP.   05/03/03 03:20:34 PMILLEJU    9
RP LNAME..... FNAME..... MI ADDRESS.....
ELDER         SCOTT          5430 GRANTSVILLE GV #I202 COLORADO
                             SPRINGS CO

PHONE.....
719-596-1225
VYR MAKE.. MODEL. COLOR.. VLIC.... ST. ADDITIONAL.....

SEX RACE HAIR EYES HT.. WT. CLOTHING-COMMENTS.....

  Date      Time     Unit  PSN   Status    Operator
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One record listed.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, Jr., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

DEPOSITION OF CLARK GADDIE
September 23, 2005

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* * * *

[50] Q. Hold it. If I may stop you, sir. And I apologize for interrupting. You just said Valium. Did you mean Haldol?

A. I'm sorry. Haldol.

Q. Excuse me. I apologize. Go ahead.

A. When he drew up the Haldol, he went to hand it to me and I explained to him, "I don't have a free hand." Because we were still trying to hold his legs down. So he reached around us, cleaned the site, and gave him in the left buttocks IM of Haldol.

Q. Then how much time passed before the decision to use the Valium was made?

A. He pulled it out. I remember the police officer asking me how long that was going to take. And I told him probably 15 to 20 minutes.

Q. Referring to the Haldol?

A. Yes, sir.

Q. Okay.

A. And that officer was not very pleased with that, which neither are we very pleased with that when it's 15 minutes of trying to restrain a gentleman. So the medic and I started pretty much having our conversation about what else were we going to give him. And we decided Valium, go ahead [51] and give the Valium.

Q. And who drew the Valium?

A. AMR.

Q. And who administered the Valium?

A. I administered the Valium. At that time we had the Curlex around his legs so that I could let go of the legs a little bit and was able and in a good position to give the shot.

Q. Were you able to independently verify that it was in fact five milligrams as opposed to something different than that?

A. No. You can see right on the side of a syringe when he gives it to me. We carry 10 milligrams of that and you can read on the side that it is Valium. So I gave him the shot and just gave him five milligrams and not ten. And I handed that back to the AMR medic.

Q. Okay. Was a third shot administered to Mr. Herring?

A. No. Those were the only two shots.

Q. Okay. There have been two reports that reference three shots being given. Would there have been anybody else aside from you and the AMR people who would be administering shots?

A. No. Unless maybe when we got into the [52] back of the ambulance and we were working on him, we were sticking him with needles to try to find IVs, and maybe PD thought that was another shot. But there were only two medications that were given to him, and that was five of Haldol and five of Valium and that was done in the bathroom.

Q. Did you at any time hear anybody make the statement "They gave him too much Valium"?

A. No. Because we only half-dosed him. We can give up to 10 milligrams by our policy and procedure and we only gave five.

Q. So if someone did make the statement "They gave him too much Valium," that would be an incorrect statement?

A. That would be very incorrect. I mean, you also have to understand, not to be mean to the police, but our police officers went to Memorial and told them—they were seen by, I think, Dr. Gifford and they told her that they had a wrestling match with a patient who bit them and the medic gave him Lithium. We don't even carry Lithium. So PD does not understand

medication that we carry or the amounts that we carry or what we're allowed to give.

And Lithium would be something that they use for mental patients or altered mental status. [53] But by our protocol that is not done. But they told Dr. Gifford I gave Lithium. So by the time I got back to the station, Dr. Gifford had called my paramedic lieutenant saying, "If he did give Lithium, I need that paramedic in my office now and probably need his license, but I'm sure that that's not the case. I'm sure they don't know exactly what medication he was given." And that was the ease.

Q. Is cardiovascular collapse a known side effect of the use of Valium?

A. No. Cardiovascular collapse to me is the same kind of catch-all that SIDS is.

Q. And I understand that, and a more specific diagnosis or cause of death is going to be part of this litigation, but I'm using that because that's what was used in the records.

Would you agree that cardiovascular collapse is not a known side effect of either Haldol or Valium?

A. I would agree to that.

Q. Would you agree that you gave half of the amount of Haldol which your protocol would allow you to give?

A. That is correct.

[54] Q. Would you agree that you gave half the amount of Valium that your protocol would allow you to give?

A. That is correct.

Q. Would it also be fair to say that even at the full dose, both of those medications are safe for their intended use?

A. Yes, sir. And if they were not, Dr. Gifford would not have them. Just like I told you, she had just pulled another medication which a lot of us medics thought was a very good drug. It's a very quick-acting drug. It is also a major tranquilizer. But because there was some cardiac events with the droperadol, she yanked that off the streets and gave us this Haldol.

Q. Is it a correct statement that at least in your opinion the administration of Haldol and the administration of Valium in the amounts given in the timing and sequence they were given was within your protocols?

A. Yes, sir, very much so. As a matter of fact, after I got a call from the paramedic lieutenant asking what medication I gave and he explained to me how Dr. Gifford was informed that it was Lithium, I explained to the paramedic [55] lieutenant, if it's okay with him, I would like to call Dr. Gifford and run this call by her.

When we have calls like this, I know a lot of people think we're callous, but we like to know if it was something we did wrong; if we did something that we were not supposed to do, we want to know about it so it doesn't happen again.

So I called Dr. Gifford directly probably prior to writing this report and asked her if she had enough time that I could run this call by her. And I talked directly to her and told her the procedures we did, the route we did, the amount that we did. And she was very comfortable with that. And I don't know if you know Dr. Gifford, but she is a tough lady, and if we screw something up, she doesn't have any problem with yanking our license or letting us know we did that, which is what she's supposed to.

Q. Is your answer complete, Mr. Gaddie?

A. Yes, sir.

Q. Thank you. Mr. Gaddie, it would be a fair statement, based upon your assessment as a paramedic, that the administration of the medication, both the amounts given, the choices of medication, and the timing and sequence of the [56] administration of the medications, were not a cause of Mr. Herring's death?

A. I would agree with that.

Q. What happened when Mr. Herring began to calm down?

A. When Mr. Herring started calming down, I asked the officers to get off him, it looked like he was relaxing, which they did. I moved him to the bathroom farther at that time. We slid him away from the bathtub so I could straddle his head. I checked for vital signs, which I listened to his lungs, I checked for a radial pulse, which 1 had a strong radial pulse, his breath sounds were clear bilateral, so he was perfusing his brain.

At this time he was not answering any questions. He was not making a lot of noise. So I was now trying to gather some more information from police, asking if there was any family members, if there was any known drugs, any known allergies, any known meds, do we know anything about this gentleman.

Q. Did law enforcement tell you that he had children with him and they had left the apartment and were in a neighbor's apartment?

A. I was not told that. As a matter of [57] fact, the first time I knew that there were children involved was when I came back to the station and Lieutenant Hekkers had been told that the kids were in another

apartment. And that was the first time that I even knew there were kids involved in this.

The whole time we walked through the apartment there was no kids in there. There was signs of looked like small children in the apartment, clothes and toys and stuff that was destroyed and thrown, but I never did see any children.

Q. Do you know when Lieutenant Hekkers received information that children lived in the apartment and were at a neighbor's?

A. No, sir.

Q. Okay.

A. And, once again, when we find a patient that ends up being a critical patient, as Mr. Herring was, we load him into the ambulance and then a fire paramedic and usually an EMT from fire, if it's a critical patient, will get in the back and help AMR out, because, otherwise, there's only one person working on him, which there should be more than one working on him.

So two of us got him into the ambulance [58] and left. Larry Armstead and Don Hekkers remained on scene. And that's when he might have got that information. They did have that when I got back to the station.

Q. Do you know whether your dispatch had that information?

A. I do not know that. And that's usually not information they probably would even know. We need to know what kind of medical we're going on and what the situation is. We usually don't ask about family.

Q. Your note indicates that approximately two, dash, three later noticed patient was in respiratory arrest. I assume that means two to three minutes after you took his vital signs?

A. After I rolled him onto his back and I listened to his lungs, it was approximately two to three minutes. And that's when I was talking to the cops about, you know, what we got, obviously he is under arrest, what hospital are we taking him to, which they wanted him to go to Memorial. Asked them if there was any drugs, any alcohol, do we know anything about the patient.

And I looked back down and at that time I realized that he was not having any rise and fall [59] in his chest. So I listened again to his lungs and he was not moving any air. I reached for a carotid pulse and I had a strong, regular carotid pulse. I told the AMR medic at this time he is in respiratory arrest. And so we started bagging, him, which means an ambu bag hooking onto oxygen and a mask over his face and we started bagging him.

The AMR medic wanted to intubate him there on the floor. And I opted not to do that just because of all the blood and glass and the mess we would have to get down into. So we threw him onto a board so we could get him to a place we could all get around him and work on him.

We slid him onto a board, kept bagging him. We didn't put straps on him. We just put enough gentlemen around him so he wouldn't fall off. And we took him outside and bagged him the whole way.

Q. If I may interrupt you, Mr. Gaddie, I'm going to back you up and take things just kind of bite by bite.

A. Sure.

Q. From reading the various and sundry reports on this case by both—mostly by police officers, it sounded as though somebody asked if he [60] was

breathing prior to the time you took his vitals. Do you recall at any time a law enforcement officer saying, "Hey, is this guy breathing"?

A. A law enforcement officer didn't—I told the officers to get off him so we could make sure he is still breathing. And when we rolled him over, the little officer on the top says, "He is still breathing, you can see his chest is rising." And he was correct. That's when I moved in and listened to his lung sounds. And he had good, clear I breath sounds, both sides, and a strong radial pulse at that time.

Q. Did any officer, to your recollection at any time ask the question "Is he breathing"?

A. I do not remember that at all, no, sir.

Q. Okay. And what you do recall is that the officer near the head said, "He is breathing, I can see the rise and fall of the chest"?

A. That was when he first got off of him, correct.

Q. And was there a question at that point as to whether he was breathing?

A. No. I made the comment that I wanted them to get off so we could make sure he is still breathing, because he had started calming down.

[61] Q. Okay. And calming down would have been indicative of a change of status and a potential change in status could have been whether or not he was breathing?

A. Could have been and it could have been just the Valium working also.

Q. Or some other event?

A. Correct.

Q. Okay. And so both you and the officer confirmed at that point he was breathing and you took vitals and determined that he had air in his lungs and a pulse and he was breathing?

A. Correct.

Q. Okay. And then about two to three minutes later you noted that he was not breathing?

A. Correct.

Q. How did that happen?

A. Like I said, I was getting information from the police officers. I had asked AMR to go out and get a board and bring their cot up and pull their ambulance closer, because they were still back over in staging. And I looked down and realized his chest was not rising and falling like it was a minute or so ago.

I listened to his lungs again, and at [62] that time he had no respiratory drive at all. So I reached for a carotid pulse and I had a still strong carotid pulse.

Q. And that means his heart was beating—

A. His heart had mechanical and electrical and he had a blood pressure of at least 80.

Q. Okay.

A. So then at that time we take over his breathing since he is not doing it.

Q. And that's the bagging you spoke of?

A. That's the bagging, yes, sir.

Q. Why was the situation such that it was inappropriate to intubate him?

A. When we intubate we basically have to lay down onto the floor right next with the patient to get him intubated. There was glass, water, blood, everything right there, and I was not willing to lay down in that. I was not willing to get—lay in glass to get cut and someone else's blood. We're trying to stay out of that. That's the reason we wear gloves and masks and goggles every time we do procedures.

So we could control his airway by bag-valve-mask until we could get into there to the appropriate place, such as the back of the [63] ambulance, where we can

kneel down and we have a better lighting, better view. And the bathroom was just tough to do that.

Q. Okay. So you placed him on a backboard, is that correct?

A. Correct.

Q. And did you carry him directly to the ambulance?

A. We carried him from where he was at, down the hallway, placed him on the gurney, which was at the door. The gurney was then wheeled to the back of the ambulance and placed directly into the back of the ambulance.

Q. And from the time that he was on the backboard until the time he got to the ambulance, you were bagging him that whole way?

A. Yes, sir.

Q. And were any other life-saving procedures done during that period of time?

A. No. And there would have been no way to do them at that time,

Q. And then I assume he was put into the ambulance?

A. Correct.

Q. And who else got in the ambulance?

[64] A. The AMR medic got in the back. Tim Karschnick got in the back. And there was a PD officer, Officer Castro, it's on the very last line of page 3, got into the back of the ambulance. I went and got my box to write—once we get to the hospital we can write a report on. I grabbed my box and I jumped in the back of the ambulance.

AMR was—the AMR medic was attempting to intubate him at that time. When I got back reached for a carotid pulse, and he at that time bad no carotid

pulse. So that's when we started CPR. And I had Officer Castro start that.

Q. How long from the time that you noticed he wasn't breathing until the time you determined he had no pulse?

A. Starting from inside the house?

Q. Yeah. From when you looked down and you say, hey, this man is not breathing until the time you determine that he didn't have a pulse.

A. Probably—because we didn't have him on a board at that time, so we were waiting for a board to come in. Probably, at the most, a minute and 15 seconds from the time I realized he wasn't breathing until we got him in the back of that ambulance.

[65] Q. From the time of the administration of the Valium and Haldol until the time that CPR began, did you follow—and by "you," I mean the responding fire department personnel—the protocols required of you by your department?

A. Yes, I did.

Q. And to the best of your observation and to the extent you're able, did the AMR people assist you in an appropriate and reasonable fashion?

A. Very much so.

Q. You indicated that Officer Castro began CPR. He was performing chest compressions, is that correct?

A. That is correct.

Q. And at that point Mr. Herring was still bagged?

A. At that point they were attempting to stick a tube down his throat to intubate hire. When we go to intubate, we hyperventilate the patient to get some oxygen in reserve, the bagging stops, they go to intubate him. If the tube is good, then we start bagging

through the tube. If the tube is not good, the tube comes back out and we start bagging again.

So when I got into the back of the

* * * *

FORENSIC MEDICINE OF DALLAS
BOARD CERTIFIED SPECIALIST IN ANATOMIC,
CLINICAL AND FORENSIC PATHOLOGY

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October 11, 2005

Mr. Robert J. Frank
Robert J. Frank & Associates, LLC
219 West Colorado Ave., Ste. 200
Colorado Springs, Colorado 80110

Re: Gregory Herring, deceased

Dear Mr. Frank:

At your request I have reviewed the following materials regarding the above referenced individual: the Fire Department records; AMR records; Event Summary Reports from AMR EMT Dana Wells and Paramedic Kevin Collins; the Autopsy Report, Death Certificate and Autopsy photographs; Colorado Springs Police Department Offense Report and Supplemental Reports of Sgt. Grimes, Off. Jeffcoat, Off. Castro, Det. Graham, Off. Marks, Det. Gysin, Det. Valasquez, Det. Wilson, Det Bjorkvist, Off. Clark, and Det. Bjorndahl; Property-Evidence Reports; Colorado Springs Metro Forensic Laboratory Reports; depositions and exhibits of Off. Rory Carroll, Off. Brent Ambuehl, Paramedic Clark Gaddie, EMT Levy Armstead, EMT Dana Wells, Paramedic Kevin Collins, Off. Gary Darress and the videotaped interview of Off. Darress 5/3/03.

The following scenario and opinions are based on a reasonable degree of medical probability plus my education, training and over thirty years of experience in injury and death investigation. My Curriculum Vitae is attached to this letter along with a list of cases in which I have testified by deposition or trial since April 2001.

Mr. Herring was a 37 year old, 6 ft. tall, 217 lb. muscular man who, on the afternoon of May 3, 2003, became paranoid, delusional, psychotic and violent. He broke out the windows of his ground floor apartment, destroyed the contents and was seen running around outside naked and bleeding. His upstairs neighbor first called police when Mr. Herring began to beat on his (the neighbor's) locked front door.

Officer Darress made first contact with Mr. Herring who at the time was in his own bedroom throwing personal property out the window. Officer Darress tried to communicate with the subject for approximately one minute while standing outside before sending Officers Carroll and Ambuehl to break down the locked front door of his apartment. From a medical and perhaps even a "common sense" perspective, the decision to escalate this violent situation was reckless, at best. Considering the size, strength and mental status of the subject this decision put all four men (Herring, Durress, Carroll and Ambuehl) at risk for serious bodily injury and/or death.

Mr. Herring confronted the officers who had broken down his door and became further enraged when Officer Carroll "pepper" sprayed him. In a very short period of time all three officers and the subject were engaged in an out-of-control brawl in the small master bathroom.

During this battle Officer Durress pushed his right thumb "quite hard" into the front of Mr. Herring's neck collapsing the trachea and effective blocking his airway. Paramedics responded and gave 5mg. of Haldol and 5mg of Valium IM. These drugs had no opportunity to even reach the bloodstream when Mr. herring suddenly "calmed" (became unconscious) and subsequently went into respiratory arrest.

By the time the subject was placed in the ambulance he was also pulseless. Cardiac monitor initially showed profound bradycardia which became asystole during transport. Two attempts to intubate this completely flaccid man were unsuccessful. An airway was finally established as they were pulling into the hospital emergency room. Mr. Herring was DOA.

I reserve the right to expand upon and/or change these opinions should more and/or more accurate information become available to me.

Sincerely,

/s/ Linda E. Norton
LINDA E. NORTON, MD

jmr: LEN
Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L. HERRING by and through Carolyn Moore, Personal Representative of The Estate of Gregory L. Herring; GREGORY L. HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.,

Plaintiffs,

vs.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, individually and in his capacity as a Colorado Springs Police Officer,

Defendants.

AFFIDAVIT OF W. KEN KATSARIS

Before me, the undersigned authority, personally appeared W. Ken Katsaris, who being duly sworn, states:

A. I am currently a certified Florida Law Enforcement Officer/Instructor, and consultant in law enforcement and corrections. I regularly instruct in a wide area of law enforcement and corrections subjects at the Regional Police/Corrections Academy, where I have been teaching for over 30 years. For over 25 years, I was also an instructor at the Florida Highway Patrol Academy. I also participate in law enforcement seminars throughout the USA where I have instructed Officers, Commanders, Agency Administrators and the Attorneys representing these Agencies on a number of liability and investigation related subjects, including the Internal Review/ Investigation Procedures following a complaint or incident. In the past I have instructed over 25,000 Officers from all 50 states including the Federal agencies and the Canadian, Royal Mounted Police in a variety of street survival police procedures that are detailed in my C.V.

My law enforcement experience includes service as a Police Officer for the St. Petersburg Florida Police Department, the Tallahassee Florida Police Department, Deputy Sheriff with the Leon County Sheriff's Office, Trooper with the Florida Highway Patrol and the elected Constitutional sheriff who performs as the Chief Law Enforcement Officer of the County of Leon, City of Tallahassee, Florida area.

My academic instructional background includes 10 years as the Department Chairman of the Crimlnal Justice Program at Tallahassee Community College (Tallahassee, Florida). In this capacity I directed and taught both the advanced in-service Police training programs and the degree granting programs, as well as directing the crime lab used to support local law enforcement. Extensive teachlng and training in-

cluding hands on skill development was taught in both criminal investigation and criminalistics courses. Academic subjects included courses in management, procedures, and criminology.

My experience includes extensive instruction to officers throughout the United States on the standards and application of use of physical force and deadly force, including the response to subjects armed with firearms or edged weapons. For over 25 years I instructed Florida Troopers on force and deadly force policy and procedure, served for 13 years as a force and deadly force policy advisor to the Florida Highway Patrol Colonel. For over 30 years I have taught these objects on a regular basis at the Regional Police Academy. I also instruct in the issues of force and deadly force for the AELE Civil Liability Seminars for officers commanders, and department attorneys. I also train the appropriate procedures for approaching, identifying, handling and restraining the mentally ill/emotionally disturbed person (drugs and/or alcohol included) in the Police Academy. Additionally, I hold certifications as a police firearms instructor and force instructor.

B. To prepare for rendering opinions, I have reviewed the following materials:

1. Personnel file/training records, Gary Darress
2. Interrogatories/Answers
3. Personnel file/training records, Brent D. Ambuehl
4. Personnel file/training records, Rory J. Carroll
5. Training:

   Use of Force
   OC

Interacting with Special Populations
Police Response to Mental Illness
Emergency Procedures
Use of Force Policy
Use of Force Continuum

6. Deposition of Chief Luis Velez
7. Deposition of Dana Wells, dated 9/26/05
8. Deposition of Kevin Collins, dated 9/26/05
9. Deposition of Larry Armstead, dated 9/23/05
10. Deposition of Clark Gaddie, dated 9/23/05
11. Deposition of Rory Carroll, dated 9/21/05
12. Deposition of Brent Ambuehl, dated 9/22/05
13. Deposition of Gary Darress, dated 10/6/05
14. Complaint
15. DVD of interview with Officer Darress

C. The below listed opinions were formulated based on my experience, training and education in the law enforcement field, the standard of care recognized by Police Organizations and Officials throughout the U.S. as the custom and practice for the administration, management and supervision of Police agencies and personnel. The opinions are based on my knowledge of the training of Police Officers throughout the U.S. in addition to my knowledge of the written standards and materials generally available for training and guiding Police Officers in their every day assignments.

D. Pursuant to engagement by attorneys for the Plaintiff in the above named case, I conducted an exhaustive review of all of the above materials. As a result of the review of these materials, which I relied

upon as the basis for my opinions, I render the below opinions:

1. The contact made with Mr. Gregory Herring on May 2, 2003, by Officers Gary Darress, Rory Carroll, and Brent Ambuehl, all officers of the Colorado Springs Police Department (SCPD) was initiated by the dispatch center receiving a complaint from a neighbor of Herrings. The information received by the dispatch center and subsequently dispatched to Officer Darress was that a black male was running nude in an apartment complex causing a disturbance. Information collected and dispatched to Officer Darress about the known factors of this incident are critical for the proper assessment of how to approach and respond with proper and accepted police procedures and practices. There was no information dispatched to Darress that the subject was posing any risk of harm to any-one, there also was no suggestion that drugs or alcohol were involved. Very importantly, there was no indication that the nude sub-ject was armed. Further information reveal-ed that while children had been at the apart-ment, they were not currently present.

2. Armed with the information provided by dispatch, Darress was able to confirm by his own observation that the subject in the apartment (Herring) was acting bizarre, was yelling incoherently, and throwing things out of the broken windows of a ground floor unit. Darress reported after this incident that he believed Herring was having a com-plete mental breakdown. This assessment would have

come from his own observation and limited attempt to communicate with Herring through a window. At the time of Darress' observation any trained police officer would have recognized Herring as exhibiting characteristic symptoms of being extremely emotionally disturbed, and/or, mentally ill and experiencing a psychotic episode—a condition for which recognized police training that has been accepted as a standard of care for decades prescribes specific basic responses. The assessment as to Herring's threat against others and himself needs to be quickly evaluated. it is obvious that Herring, while destructive to things, was not attempting to hurt himself, and good information related he was alone in the apartment. Darress even, for the most part, looked in windows and verified he was alone. Herring did not threaten Darress or any other officer or person, but was involved in destruction of his own property. Herring did, however, tell Darress he was afraid of the police—a common characteristic of the emotionally disturbed.

3. Darress, along with Officers Carroll and Ambuehl, did not activate to respond to Herring's condition or activity in any manner consistent with the police recognized standard of care for either recognizing, approaching, responding to or communicating with a mentally ill or emotionally disturbed person—especially one situated like Herring, who was in an apartment, alone, and not threatening anyone while experiencing this episode.

4. While the officers later acknowledge in their depositions that they accept there are factors that were exhibited by Herring that would have led to the conclusion he was mentally ill, and that there are practices that suggest a proper response, there was not a hint of their implementing this response. Likely, the reason was a lack of training provided by the CSPD for contact with this special population. Admittedly, there was some training in their basic training program on the police response to the mentally ill, the time spent and amount of training fell far short of the recognized standard of care for digesting the basics of response to the emotionally disturbed. The training was of such a minuscule amount for such a likely encounter by a police officer that the amount of training simply reached a level of deliberate indifference because of the significance of the potential contact with people who are mentally ill, and emotionally disturbed. The officers indicated that hundreds of such contacts have been made with this special population by the CSPD in the last five years. Such a core responsibility must be met with a concomitant training curriculum so that officers will immediately recognize, approach, and contact the mentally ill within guidelines that are tried and proven for high success of a resolution without death or serious injury—an outcome that differed 180 degrees from this incident.

5. Darress spent only several minutes in contact with Herring before telling Carroll to kick in the door and enter, Once Carroll and

Ambuehl entered, an up-close encounter ensued where OC was deployed and overwhelming physical force was applied—force that falls in the upper levels of force, such as strikes with a baton to the head, the application of fists to the head, as well as a neck compression—all of which are trained as the application of deadly force. The officers had no knowledge of the research on the use of OC against the mentally ill, and the application in this incident escalated the need for force. Other overwhelming physical force was applied, and contrary to recognized police procedures, Carroll asked responding medical assistance to give an injection of Valium, or other calming drug.

6. The breakdown on proper police procedures began when Darress did not assess that this was a mental health issue and that because there was no threat to Herring or others, that a perimeter be established and communication begun to calm Herring. There was no recognition that time was on the side of the police for a resolution without injury to the officers or Herring. The almost immediate entry, when Herring already voiced fear of the officers, escalated the need for force. Furthermore, Darress did not, even think to contact his supervisor for assistance with an assessment. Entry in incident was improper and exacerbated and accelerated a contact before any of the recognized procedures were implemented. It is well recognized that absent a direct and imminent threat, officers should keep their distance

and not be threatening with an emotionally disturbed person.

E. If further discovery materials are provided, they will be thoroughly reviewed, and may have an impact on the above opinions. If this should occur, these revised/new opinions will be immediately revealed to the retaining party. I reserve the right to supplement and amend my opinions based upon additional information provided to me.

F. As an attachment I incorporate Exhibit "A", a complete curriculum vitae which cites a complete 36 year history I have as a member, instructor and consultant in the Criminal Justice field and a list of cases in which I have testified as an expert at trial or by deposition within the preceding four years, and my Fee Schedule and Agreement signed by the retaining firm.

Respectfully submitted this 12th day of October, 2005.

/s/ W. Ken Katsaris
W. KEN KATSARIS

STATE OF FLORIDA
COUNTY OF LEON

Sworn and subscribed to this 12th day of October, 2005, by W. Ken Katsaris, who is personally known to me.

/s/ Sara S. Alligood
SARA S. ALLIGOOD, Notary Public

My Commission Expires:

U.S. DISTRICT COURT
DISTRICT OF COLORADO

Notice of Electronic Filing

The following transaction was received from Frank, Robert entered on 10/17/2005 at 4:53 PM MDT and filed on 10/17/2005

Case Name:	Herring et al v. City of Colorado Springs, et al
Case Number:	1:04-cv-2429
Filer:	Gregory L. Herring Gregory L. Herring, Jr Summer Herring Gregory Q. Herring Gregory Louis Herring

Document Number: 47

Docket Text:

RESPONSE to Motion re [39] MOTION for Summary Judgment filed by Plaintiffs Gregory Q. Herring, Gregory L. Herring, Gregory Louis Herring, Gregory L. Herring, Jr, Summer Herring. (Attachments: # (1) Exhibit Exhibit A# (2) Exhibit Exhibit B# (3) Exhibit Exhibit C# (4) Exhibit Exhibit D# (5) Exhibit Exhibit E# (6) Exhibit Exhibit F# (7) Exhibit Exhibit G# (8) Exhibit Exhibit H)(Frank, Robert)

The following document(s) are associated with this transaction:

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Robert Wallace Carney
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Robert John Frank
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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 04-cv-02429-PAC-BNB

ESTATE OF GREGORY HERRING, *et al.*,
Plaintiffs,

vs.

CITY OF COLORADO SPRINGS, *et al.*,
Defendants.

Proceedings before PATRICIA A. COAN, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 9:13 a.m., November 15, 2005, in the United States Courthouse, Denver, Colorado.

APPEARANCES

ROBERT FRANK, Attorney at Law, appearing for the plaintiffs.

SHANE WHITE, Attorney at Law, appearing for the defendants.

MOTIONS HEARING

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[2] PROCEEDINGS

(Whereupon, the within electronically recorded proceedings are herein transcribed, pursuant to order of counsel.)

THE COURT: Please have a seat. This is 04-cv-02429, the Estate of Gregory Louis Herring, et al., versus the City of Colorado Springs, et al. The parties have consented to disposition of this case before a magistrate judge under 28 USC 636(c), and the matter before the Court today is a motion's hearing. And we have Mr. Frank—

MR. FRANK: I'm here, Your Honor.

THE COURT:—for the plaintiff—plaintiffs, and Mr. White—

MR. WHITE: Yes, Your Honor.

THE COURT:—for the defendants. All right. Before you get started on arguments, I have two questions. One is there's mention in the briefing of all parties stipulating to dismiss state tort claims, and what's happened with that?

MR. FRANK: Your Honor, we've made the agreement, and I thought that Mr. White had filed a document with the Court. Did you do that, Shane?

MR. WHITE: My recollection is I sent it over to you, and I'm not sure if you (inaudible—no microphone).

[3] MR. FRANK: Your Honor, we'll be happy to track that down. They certainly have been dismissed by stipulation. If the stipulation has not been filed, I'll be responsible—

THE COURT: Right. As—

MR. FRANK:—to make sure that gets done.

THE COURT:—as far as I know, it has not been filed. Can you get that in by Monday?

MR. FRANK: I can, Your Honor.

THE COURT: Okay. So the stipulation to dismiss the state tort claims will be filed by Monday.

And the other question I had is: Did you have a settlement conference with Judge Boland earlier this week?

MR. FRANK: No, Your Honor, we—by stipulation requested of Judge Boland that we move it until after this proceeding. Both parties feeling that realistic settlement possibilities will be dependent in part on the outcome of this today.

THE COURT: Okay. So you have another one set?

MR. WHITE: No, Your Honor. Judge Boland has directed us to reset it—

THE COURT: After you get a ruling?

MR. WHITE: Yes, Your Honor.

THE COURT: Okay. All right. And then the matter before the Court today is the defendants' motion for summary [4] judgment which was filed August 1st, docket number 39. Okay. So that's your motion, Mr. White.

MR. WHITE: Yes, Your Honor. One thing beforehand with regards to the stipulation, my understanding also is it involves stipulating to the dismissal of Chief Velez.

MR. FRANK: I was just—

THE COURT: Is that right?

MR. FRANK: I was just about to speak up and say that as well, Your Honor.

THE COURT: Okay. The state tort claims and Chief—

MR. FRANK: Velez, Your Honor.

THE COURT: Gomez.

MR. FRANK: Velez, Your Honor.

THE COURT: Okay. All right. Anything else before you get—

MR. FRANK: I have just one very brief housekeeping matter, Your Honor. I want to apologize to the Court and counsel for my lateness in arrival. I mean no disrespect to either, and I just thank you for not starting without me.

THE COURT: Well, it's miserable weather, and I've done that drive to Colorado Springs a number of times, so I know how it can get.

All right, Mr. White.

MR. WHITE: Thank you. May it please the Court and [5] counsel. Your Honor, this case arises out of an incident which occurred between three Colorado Springs police officers and Mr. Gregory Herring on May 2nd, 2003. On that date, various 911 calls were placed to the Colorado Springs Police Department regarding Mr. Herring causing a disturbance at the Winfield Apartments. It's an apartment complex where Mr. Herring lived. It consists of various buildings.

Two of those calls were placed by a Mr. Scott Elder. He was a resident of the apartment complex. He had looked out his window and had observed Mr. Herring banging on other apartment doors. He then observed him go from one apartment building, across the apartment complex parking lot over to his building, heard him pounding on doors beneath his apartment, stomp up the stairs to his second floor apartment and start pounding on his door.

At that point, he feared for his safety. He feared—he estimated that Mr. Herring was approximately 240 pounds and over six feet tall. He feared for his safety and actually went out to his balcony and called 911. It was his intent to actually jump from his second story balcony if Mr. Herring had broke down his door. He was that afraid of Mr. Herring and what Mr. Herring may do.

While he was on the phone with 911, Mr. Herring left Mr. Elder's apartment and Mr. Herring went back to Mr. [6] Herring's own apartment. Mr. Elder while on—still on the phone with 911, looked out his front window and saw that Mr. Herring was back in his own apartment, had broken out a window to his apartment and was throwing various items out of his apartment. Mr. Elder ended the call at that point, but shortly thereafter placed another call to 911 to give further reports. Those other—those further reports consisted of Mr. Herring continuing to throw items out of his apartment, that Mr. Herring was naked at the time, that he had a cut on his abdomen and on his arm and that he had seen children running screaming from Mr. Herring's apartment.

Based upon these 911 calls, the Colorado Springs Police Department dispatched out the fire department, the ambulance service and three Colorado Springs police officers who are the defendants in this action. Those officers are Officers Darress, Carroll and Ambuehl. Officer Darress was the first officer to arrive on the scene. When he arrived on the scene, Mr. Elder directed him over to where Mr. Herring's apartment was, and he also indicated to Officer Darress that children had run from the apartment.

Officer Darress made his way over to Mr. Herring's apartment and when he first approached the apart-

ment he noticed that the front window was broken out and there was debris all over the ground. He looked into the apartment [7] and saw that the apartment had basically been demolished. In his own words, he said it looked like a bomb had gone off, and also observed that there was blood on the walls.

He made his way around the apartment building, noticing that each window he came to had been broken out, that the areas inside the apartment that he could see were trashed out also and that blood was on the other apartment walls as well. He came around to the back side of the apartment where he saw Mr. Herring standing at a broken out window throwing things out of the window. Mr. Herring was naked he observed, had blood all over his abdomen, had blood all over his body. At times, he was leaning up against a broken window frame with glass in it.

Officer Darress suspected that that's probably how he was cutting himself, at least on the abdomen. He also felt that Mr. Herring was injuring himself at this point. Officer Darress introduced himself to him and tried to talk to Mr. Herring, and Mr. Herring made various statements to Officer Darress, some regarding war, some regarding God. Some statement that he thought that Officer Darress may be there to try and harm him. Officer Darress tried to calm him, indicate that he was not there to harm him.

While Officer Darress was talking to Mr. Herring, Officers Carroll and Ambuehl arrived on the scene. Upon arrival, Officer Ambuehl—excuse me, Officer Carroll [8] observed that there was blood on other apartment doors. He surmised that that might have been from the pounding, because he was also informed that Mr. Herring had been banging on other apartment doors.

Mr. Elder also directed Officers Carroll and Ambuehl over to Mr. Herring's apartment at this time, and Officers Carroll and Ambuehl also observed the same destruction, broken out windows, debris. Observed that there was blood on the sidewalk as well. Observed these things as well as Officer Darress. They made their way around to the back side of the apartment and observed Officer Darress trying to talk with Mr. Herring.

As I stated earlier, Officer Darress thought that Mr. Herring was injuring himself and was in need of help at that point. He was clearly injured, he had blood all over himself. There was blood all over the walls, and he was not sure if anyone was in the apartment, although he had been told that children had left. I believe Mr. Herring also had mentioned something about children leaving, but he was not sure if anyone else was in the apartment, but clearly Mr. Herring was harming himself at this point, and he thought that if he distracted Mr. Herring, he could have Officers Carroll and Ambuehl go in and take Mr. Herring to—basically restrain him for his own good and to see if—and help anyone else that may be in the apartment.

[9] He directed Officers Carroll and Ambuehl to go check the door. Officer Ambuehl checked the door while Officer Carroll waited by the corner, one of the corners of the apartment building. Officer Ambuehl found that the door was locked. Officer Ambuehl and Carroll came back and informed Officer Darress of this, and Officer Darress instructed them to kick in the door and go in.

They proceeded to kick in the door and then—and did go in. The apartment build'—the apartment was trashed out. There was debris everywhere. The offi-

cers had to climb over items just to get through the apartment. They noticed that blood was all over the walls as well. Officer Carroll went directly back to the back bedroom where Mr. Herring was and Officer Ambuehl checked other rooms to see if anyone else was in the apartment. Fortunately, no one else was in the apartment. Mr. Herring was alone at this time.

The apartment—or the bedroom that Mr. Herring was in was in a back bedroom and it was kind of a master bedroom. It was a bedroom and a bathroom combined, so when you go off the hall and into the bedroom you also go into an area where the bathroom is at the same time. Officer Carroll went into that bedroom and stopped by the bathroom door. At this point, Mr. Herring observed Officer Carroll. Mr. Herring turned, looked at [10] him, threw a broken shelf at him, then threw a bottle at him. Those items did miss Officer Carroll, but they were thrown directly at Officer Carroll.

Officer—or, excuse me, Mr. Herring then started to come towards Officer Carroll. Officer Carroll said to stop. He did not, so Officer Carroll removed his OC spray, or Mace spray as it's commonly called, and sprayed Mr. Herring in the left eye one time with a one-second shot of OC spray. Officer Ambuehl had worked his way to the bedroom at this time and was standing at the doorway between the bedroom and the hallway and he observed this.

Mr. Herring, after being sprayed, covered his face and turned away for about one second, wiped the OC from his face, turned back, stated to Officer Carroll, And now we are all going to die, and came at Officer Carroll.

THE COURT: Now, you're all going to die, now, or we're all going to die?

MR. WHITE: We're all going to die. We are, to my recollection.

Officer Carroll told him to stop but he did not, and he charged into Officer Carroll forcing him back. Officer Carroll and Mr. Herring hit the door which caused it to shut, so Officer Ambuehl is now in the hallway with the door shut between him and the bedroom. Officer Carroll and Mr. Herring then fell to the bathroom floor and began [11] struggling.

During the struggle, Mr. Herring grabbed Officer Carroll's testicles quite hard, squeezed quite hard causing extreme pain to Officer Carroll. Officer Carroll hit Mr. Herring a couple of time in the back trying to get him to let go and telling him to let go of his testicles.

At this point, Officer Ambuehl had made his way through the door and had grabbed Mr. Herring's legs and feet area to try and control him, and the two officers were now struggling with Mr. Herring on the bathroom floor. It's a very confined area.

Mr. Herring at this point did let go of Officer Carroll's testicles but was struggling extremely hard with the officers. In fact, he was basically throwing them around the bathroom at this point. During this time, Officer Darress had run around the apartment building and had entered through the front door. When he entered the front door, he saw a blanket or a comforter, something along those lines, and thought that maybe if he grabbed the blanket or comforter he could use that as a—kind of a restraint device on Mr. Herring to get him restrained so they could help him.

He grabbed the comforter or blanket, made his way back to the bathroom and tried to wrap Mr. Herring up with the blanket, but that did not work. It went flying off, I [12] believe, into the bathtub. At this point, all three officers are in the bathroom with Mr. Herring. They're all on the bathroom floor. Officer Darress is up by Mr. Herring's head and shoulders on his right side, Mr. Herring is on his stomach, so he's up by his right head and shoulders. Officer Carroll is up by Mr. Herring's—on his left side by his head and shoulders, and Officer Ambuehl is back by his feet or his leg area trying to restrain his legs.

At this point, the struggle just escalates. Mr. Herring does many—commits many acts of violence on the officers and they react in kind, quite frankly. Mr. Herring on a couple of occasions tried to grab Officer Carroll's gun. He did bite Officer Carroll on that right hand. He did bite Officer Darress in the knee. He grabbed Officer Darress's testicles as well. I would guess this Court could take judicial notice of the pain and the danger in that sort of a violent act.

He grabbed Officer Darress's PR24 or what is called a baton. He was generally just struggling with them extremely hard. On a second occasion, he said that, We are all going to die. The officers took this as a threat that he was going to kill them. Combined with his acts of violence, they believed, as Officer Darress testified to, that—he testified that he was in a fight for his life.

[13] Now, that is what Mr. Herring did. The officers, as I said, did respond. Officer Carroll I believe hit him in the back a few times, hit him in the shoulder a few times, hit him in the face a couple of times when he was biting him. Officer Darress struck him in the head a couple of time with the soft side of his fists,

not the knuckle portion but the soft side. Hit him a few times with what's called a flat chop with his PR24 after he got it back from him.

He, I believe, hit him in the back also. He was leaning on his back to try and get him to lay back down. It was his fear that if Mr. Herring got up that there would be no way they could even try to control him. Not that they were controlling him now, but they were basically maintaining the status quo.

Officer Darress on two occasions called for the medical personnel to come in and help them. Finally, the medical personnel did come in. They consisted of the fire department personnel and the American Medical Response or AMR personnel. Immediately, the fire and AMR personnel tried to help the officers restrain Mr. Herring, but the space was very confined and Mr. Herring was fighting extremely—was really fighting a lot.

One of the things I neglected to say, and I believe this will be an issue, or at least important, is one [14] of the things Officer Darress—one of the acts performed by Officer Darress on Mr. Herring was that he put him thumb—pressed his thumb into the side of Mr. Harris's—Mr. Herring's neck. As the plaintiffs point out in their brief, it was on the right middle portion of the neck. If you're going to like basically put your thumb in your ear and go straight down, that is where the point was on the neck. And he quite hard pushed that point in with his thumb to try and get Mr. Herring to calm down and control him. That basically had no effect on him, however.

To get back to the AMR and fire personnel. They came in, they tried to control Mr. Herring, they could not. Officer Carroll did ask if some sort of sedate—

something to sedate him could be given, as the—I believe it was the fire paramedic Gaddie testified that they do not go by the officers' request. They make their own determination as to whether or not a chemical restraint is appropriate. In this case, they determined that a chemical restraint was appropriate.

The AMR paramedic drew a five milligram shot of Haldol and administered that to Mr. Herring's left buttock. Some time passed, a fairly short period of time, Mr. Herring did not calm down. It was determined that another shot should be given. The AMR paramedic drew a five milligram shot of Haldol at this point. He could not get in due to [15] the struggling that was continued on, so he handed the syringe to fire paramedic Gaddie who administered that in Mr. Herring's left buttock as well.

A short time after that second shot was administered, Mr. Herring did calm down. Whether or not the shots had any effect on him, there was no indication in his bloodstream from the autopsy report that there was any in his bloodstream. Whether or not that had any effect, I don't know, but shortly after the second shot was given he—Mr. Herring did begin to calm down.

After he was calmed down, fire paramedic Gaddie asked if he was breathing. Officer Darress checked his pulse. He was breathing at that time. At that time the three officers left the bathroom and left the apartment in order to attend to their own injuries. Mr. Herring was then left in the custody of the fire department personnel and the ambulance personnel. They turned Mr. Herring over on his back, pulled him closer to the door.

My recollection is at this point the driver of the ambulance went out to get the stretcher, which left—there were three, actually four, fire department personnel and one AMR personnel in the bathroom at that time. Really, the only people having anything to do with Mr. Herring was fire paramedic Gaddie and Mr. Collins who was from AMR, at this point. They were the paramedics.

[16] They turned him over on his back, pulled him towards the door. Fire paramedic Gaddie again checked his carotid pulse, which he had a strong pulse. He checked his breathing, his breathing was fine. At this point I believe the lady—AMR driver had come back with the stretcher. She had to leave it at the door because she couldn't get it in through all the debris, but did bring in a backboard.

They then—this has been a couple of minutes—then noticed that Mr. Herring had stopped breathing. Fire paramedic Gaddie again checked Mr. Herring's carotid pulse. He had a strong pulse, so he started to ventilate or bag Mr. Herring. They then loaded him on the backboard and brought him out of the apartment and then loaded him onto the stretcher and rushed him to the ambulance. When they got to the ambulance, they checked his pulse again, and at this point he did not have a pulse.

They continued bagging him and began CPR, loaded him into the ambulance and rushed him to the hospital. On the way to the hospital they continued CPR and ventilated him at the times they were not trying to intubate him. I believe on the third try they did eventually get him intubated, brought him to the hospital, rushed him in. The emergency personnel worked on Mr. Herring at that time. Unfortunately,

Mr. Herring passed away, which brings us to this lawsuit.

[17] Those are the facts in this case. There is not one material fact that is in dispute in this case. As a result of the facts not being in dispute, defendants have brought this motion for summary judgment alleging qualified immunity. Because there's no dispute of fact the defendants have shown, the burden now shifts to the plaintiffs, and they have a heavy two-part burden. First, they must show that the defendants' actions violated a constitutional or statutory right. Second, if they show that, they must show that the right in question was clearly established at the time of the alleged unlawful conduct.

There's basically two sections of this case with regards to the police officers. The first section of this case deals with their decision to enter the apartment. The second section of this case deals with what happened between the officers and Mr. Herring after they entered the apartment. Regarding their entry into the apartment, it is not disputed that the officers did not have a warrant. And it does not appear, from reading the briefs, that the plaintiffs are disputing that a warrantless entry is lawful if exigent circumstances exist.

Exigent circumstances exist if somebody is in need of aid and an officer reasonably believes that somebody is in need of aid. It's the Emergency Aid Exception I believe is what it is called. Mincey versus Arizona is the case [18] that says that. In order for exigent circumstances to exist under one—under this situation, three elements must be satisfied. The first element is that there must be reasonable grounds to believe that someone inside is in need of immediate aid. The second element is that the search or the

entry must not be motivated by an intent to arrest or an intent to seize evidence. And the third element is that there must be a reasonable basis approaching probable cause to associate the area that was searched or entered with the area of the aid.

All three of these elements exist in this case. Clearly, the officers had reasonable grounds to believe that someone inside was in need of immediate aid, either Mr. Herring or possibly children or possibly someone else. The reports of Mr. Herring acting violently, the destruction of the house, the broken windows, the children's toys, the reports of children running from the house. So they were in there at one point. Are there others in there unknown? All the blood everywhere. There's blood on other doors, there's blood on the sidewalk, there's blood on the walls, there's blood on Mr. Herring on his abdomen, on his whole body. There's a lot of blood. Clearly, there's an indication that someone in the house, or in the apartment, rather, was in need of immediate aid. If it wasn't Mr. Herring—and, certainly, there's reasonable cause for him—then possibly [19] someone else as well.

The officers' intent in this situation or at this point is relevant. What was their intent? Well, their intent was to go in and help Mr. Herring, obtain medical need for him and help anyone else that may in need of aid, either to help them stay away from being hurt more or to be hurt at all by Mr. Herring or to get them medical attention. Their intent was not to seize evidence and their intent was not to arrest anyone.

And the third element is somewhat similar to the first element. Is there a reasonable basis to associate the area to be searched, or, in this case, entered with an emergency? Certainly Mr. Herring's apartment,

that's where Mr. Herring is, that's where all the broken window is, that's where all the debris is, that's where most of the blood is. Certainly there's a reasonable basis approaching probable cause to associate that particular apartment with the area that needs to be entered.

I think it's important to keep in mind at this point is that while there was no one in the apartment at the time, the issue is not whether someone was actually in need (sic) of risk. I believe that Mr. Herring certainly was. Obviously, no on else was, but the officers had a reasonable belief that someone else was. The issue is not whether someone was actually in there in need of aid. The issue is [20] whether a reasonable belief existed that such person or persons were in need of aid.

Here, clearly, there was that reasonable belief and clear to the officers that exigent circumstances, and, therefore, their entry was lawful and reasonable and did not violate a constitutional right. The second area as I indicated regarding the officers is their interaction with Mr. Herring once they're in the apartment. First, Officer Carroll approaches Mr. Herring, and Mr. Herring throws a shelf, a broken shelf, and a bottle at Officer Carroll and then starts to approach. Officer Carroll tells him to stop, he does not, so he sprays Mr. Carroll with OC—excuse me, he sprays Mr. Herring with OC. That's a relatively low level of force in that—in any situation, particularly the situation where the person has been violent, the officers know that going in, they know there's a risk, he has exhibited an act toward the officers of throwing two items at this particular officer and then starting to approach him. He didn't charge them at this point, but he did start to approach.

Officer Carroll reasonably could believe that his safety was in danger and a reasonable amount of force at this point would be to deploy a one shot one second burst into his face to try and de-escalate him in order that he be taken into custody for his own safety and, at this point, [21] the safety of others because Officer Carroll did not search the rest of the house, it was Officer Ambuehl that did.

That, unfortunately, did not work. It doesn't work on everybody. I would submit that it works on the majority of the people, but it doesn't work on everybody. It did not work on Mr. Herring and did—the situation escalated after that. But, at that point, Officer Carroll was reasonable in his belief that his safety could be in danger, and he's entitled to defend himself with a degree of force that is reasonable to the degree of force against him.

It is pointed out in the plaintiffs' brief that nothing hit the plaintiff—or nothing hit the officers when Mr. Herring threw those objects at them, that's true. But he did throw at them, he did do a violent act and it was—from the officers' perspective he intended to hit them, intended to hurt them. It's like saying, Well, you got shot at but you didn't get hit so there was no danger. It doesn't seem to make a lot of sense to me.

Well, after the OC spray was deployed, that's when the situation just completely erupted. Mr. Herring attacked Officer Carroll and he grabbed his testicles. Officer Carroll hit him back, Officer Ambuehl came in. Basically, the only act of force, shall we say, used by Officer Ambuehl was to try to restrain his legs. Officer Darress came in and, as I cited in my facts, Officer Darress, Officer [22] Carroll and Mr. Herring all basically employed acts of force on each other. It was—it was a struggle at this point.

But the officers did not act unreasonably in this case. They're entitled to use an amount of force to protect themselves and to restrain Mr. Herring. They did hit him. They did not, however, take out their PR24s and just beat him mercilessly. This is not a Rodney King case. They did not employ OC spray again. They did not use a Taser. They did not pull out their weapons. They used a reasonable amount of force under the circumstances, and I would submit they used less than the amount of force they probably should have because they couldn't control him at this point. They needed the chemical restraints to control Mr. Herring at this point. But, nevertheless, they employed this—a certain amount of force. That amount of force was reasonable in the circumstances and, therefore, was not excessive and, therefore, no constitutional violation occurred. Therefore, the officers are entitled to qualified immunity.

The second test or the second part of heavy two-part burden does not even need to be reached at this point because the officers did not violate a constitutional right. However, setting that aside for the moment, a second part of the two-part test is that the right has to be clearly established at the time of the alleged unlawful conduct. [23] And that right has to be clearly established in a particularized sense, i.e., there has to be a decision on point either from the Tenth Circuit or from the United States Supreme Court or from the other circuits in general saying that, This is the rule. What the officers did in this situation is unlawful, and so it puts the officers on notice. That is a burden that is on the plaintiffs, and the plaintiffs have not cited one case with regards to the excessive force issue let alone one case on point.

There are some cases I would submit not on point tangentially related they cite with regards to whether the officers should have gone in to begin with, the Myers case, the Muskogee case, the Sevier case, but there's not one case that I can—that I recall that the plaintiffs cited with regards to the officers use of force in this type of situation to say that what they did was unlawful. They have not met the second part of their burden and, therefore, the officers are entitled to qualified immunity.

The other defendant in this action is the City of Colorado Springs. The plaintiffs allege that the City of Colorado Springs is liable basically because, (a), of the officers actions and, (b), because they didn't train them well enough. Two—for a municipality or a city to be liable based upon an employee's actions, two elements must be met. First, there must be a constitutional violation [24] and, second, there must be a custom or policy of the city which was the moving force behind that constitutional violation. As I've just discussed, there was no constitutional violation here so the City cannot be held liable.

Putting that aside for the moment, plaintiffs have not shown any custom or policy of the City, which was the moving force behind any alleged constitutional violation; therefore, the City cannot be held liable. It does not appear from reading the briefs that the City—excuse me, that the plaintiffs are alleging that there was a custom or policy of the City, rather they appear be alleging that this is a single incident and, because of this single incident, liability is imputed towards the City.

That is rare that a single instant can impute liability to the City. Granted, it can happen and does happen, but it is rare. But for it to happen, certain

things must be met. First of all, the individual that commits the single incident must be in a policy-making situation or a policy-making role, that sort of authoritative figure. A patrol officer is not a sufficient policy-maker or a policy-making authority figure to satisfy that element. Therefore, in this case, since all of the officers were patrol officers, the City cannot be imputed to their single incident.

[25] Putting that aside for the moment, to establish a failure to train claim, plaintiffs must also satisfy a four-part test. Generally, the four-part test consists of, one, a constitutional right has to be violated. Two, it has to be a usual or reoccurring situation that police officers deal with. Three, that the City had to have exhibited a deliberate indifference with regards to the training issue, and, four, there has to be direct link between the training and the injury.

The plaintiffs have not established all four elements. They can establish one, two or three, they need to meet all four. There's an "and" in there. The constitutional right issue has been addressed already. Putting that aside for the moment, plaintiffs claim that this was a reoccurring—a usual and reoccurring situation because police officers as a usual part of their jobs deal with mentally ill people.

Assuming for the sake of this argument that Mr. Herring was mentally ill, that does not seem to be applicable to this situation. I think it's probably true that police officers deal with mentally ill people all the time. But to this degree and to this level of conduct I would say is a highly unusual situation. In fact, the fact that the plaintiffs' don't cite one case that I would describe as on point is indicative of how unusual the [26] situation was. Therefore, they don't satisfy the second element.

The third element regarding the City exhibiting deliberate indifference, basically what plaintiffs say through their expert which, according to the case of Carr (phonetic) versus Castle (phonetic) is not sufficient, but basically the plaintiffs just make the claim that the City was deliberate indifference—deliberately indifferent to the training because not enough training regarding mentally ill was provided to the officers. But they don't establish that the City was aware that this type or this lack thereof of training would likely cause a constitutional violation. They don't show that this is—this type of extreme situation was recurring, that you need more or different training to deal with this type of situation. They don't show that the City had various training options and deliberately chose Option B instead of Option A when Option A clearly would have been the better choice. They have not met the deliberate indifference standard and, therefore, have not met the third element.

Finally, with the direct link between the training and the injury, basically, again, they seem to saying because there wasn't enough training in this area, that caused the injury. But the case of—it's Fuston-Lounds versus Torres states, quote: It is not enough to argue that [27] an officer was not trained to know how to react in a specific factual scenario. Instead, plaintiffs must show that the officer was trained to act in such a reckless or incorrect manner that their training caused the harm.

In this situation, they're not saying that the training caused the harm, they're saying just the opposite, that there wasn't enough training. That the officers didn't know how to act or react in a specific factual scenario given this factual scenario. According to case law, it's not enough to allege that. They're alleg-

ing the exact opposite of what they need to allege to show a direct link. The direct link is that the training has to have caused the injury, and they're not alleging the training caused the injury. They're alleging that there wasn't enough training, which is just the opposite of what they need to allege to satisfy this element. Therefore, liability cannot attach to the City.

Finally, plaintiffs are alleging that the officers violated the familial association or familial companionship. For this they need to show an intent to actually interfere with the relationship. Plaintiffs in their brief acknowledge that this intent requirement exists. However, they seem to be saying that the officers acted recklessly with regards to how they treated Mr. Herring, and, therefore, that reckless conduct should be a substitute for [28] the intent requirement.

However, the case of Hill versus Martinez and Beck versus Calvillo basically address that exact argument and basically said that the reckless standard is not an appropriate standard regarding this familial association claim. You need an exact intent, and the intent has to be to interfere with the relationship. You can't transfer an intent. You can't take an intent that the officers exhibit towards Mr. Herring and transfer that now to the Herring children who are making this claim.

The intent has to be towards the relationship and towards the Herring children, and there was no intent here to interfere with any relationship, the intent was to help Mr. Herring. And I know that there's an objective test with regards to excessive force. An intent as far as excessive force is irrelevant, but intent is specifically relevant to the familial

association claim, and their intent was to help Mr. Herring. It had absolutely nothing to do with the relationship, therefore, the familial association or companionship claim should be dismissed as well.

Based upon my argument, I would ask that this Court grant the defense motion for summary judgment and dismiss the plaintiffs' claims. And unless you have any questions—

THE COURT: I've got two. I thought you said that [29] the officers went into the apartment because they were worried about another person in there or the children. Hadn't Mr. Elder told the officers the children had left?

MR. WHITE: Mr. Elder told Officer Darress that. He did not tell—

THE COURT: Not—

MR. WHITE:—Officer Herring—excuse me, Officer Carroll and Ambuehl. There was a teletype, so to speak, I'm not sure exactly what the proper word is, the call that the officers get over their screen that said that children had run from the apartment. I believe that showed twice. So the officers had a knowledge that children had run from the apartment, but they still had a concern that children may be in the apartment because of that reference to the children. That was conveyed to Officers Carroll and Ambuehl. The statement by Mr. Herring and the statement by Mr. Elder was only conveyed to Officer Darress.

THE COURT: Okay. Then I have another question about what happened in the bathroom. Part of Darress's affidavit talks about pushing down on

Herring with his arms and upper body in a jumping motion.

MR. WHITE: Yes, I—

THE COURT: What's that all about?

MR. WHITE:—I put that in that specific words because in their complaint they allege that he was jumping [30] up and down on him, and it gives the impression that Officer Darress was on his feet jumping up and down on him which is not accurate. What happens is Officer Darress was on his side. They were all laying down. And Mr. Herring got up on his forearms and was pushing up and Officer Darress laid on his body—on Mr. Herring's back and was doing this sort of motion, pushing down with his upper body. In—with a jumping motion with his upper body. I was trying to distinguish that he wasn't on his feet jumping because, in my opinion, that's what the complaint—gives that impression and that's not what an accurate impression. They were all lying down on the ground.

THE COURT: Okay. And then what about Officer Carroll hitting Mr. Herring in the back twice with his fist.

MR. WHITE: Yes, Your Honor. That was when—

THE COURT: And is that a closed fist or a knuckled fist or what are you talking about?

MR. WHITE: My understanding was it was a closed fist with the soft side of the fist. He like pounded down on him.

THE COURT: Sideways. Okay. That's all I had on questions. Mr. Frank?

MR. FRANK: May it please the Court, Counsel. Your Honor, I'd like to note at the outset that Mr. White's argument took approximately twice as long as this entire [31] incident did. And that becomes very important under the real issue of this case. And I disagree respectfully with Mr. White as to what that issue is.

The issue in this case is whether the defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use the force. There is case law specifically on point, Your Honor, that where an officer, by their own reckless or deliberate conduct during a seizure, unreasonably creates the need to use such force. That's the inquiry that the Court makes, and if there is a genuine issue of material fact as to whether the officers' conduct was the conduct that caused the need for force, and in this case lethal force, then, Your Honor, they may be held liable, and I refer specifically to the Sevier opinion, 60 F.3d 695 which is a 1995 Tenth Circuit case.

The precise sequence of events and what the officers knew in this case, Your Honor, is extremely important. As the officers received the call and went to the scene, they were relayed information both by radio and via a computer which was in their car. As the officers responded, they were informed that a reporting party was inside his apartment with a neighbor outside banging on the door. They were informed that no weapons were involved, that the altercation was a verbal altercation and not a physical altercation. That the suspect's name was Gregory [32] Herring who was an African-American male, approximately 6 feet, 2 inches tall, weighing 240 pounds.

The initial report was that there were no injuries. The initial report was that the suspect was in his own apartment. The initial report was that the children were running away from the apartment. That containers and furniture were being thrown out of the apartment. A later call indicated he was nude. And there was a second notification from dispatch that the children had fled the apartment.

So each officer, Your Honor, as they arrived were told not on one occasion, but on two separate occasions from dispatch that the children had left. When Officer Darress arrives on the scene, he contacts a third party, and the third party again tells Officer Darress that the children had left the apartment.

Officer Darress approaches Mr. Herring's apartment and is standing within inches of the window. Whatever threat Officer Darress faced, it wasn't a sufficient threat that he was keeping distance between himself and Mr. Herring. Mr. Herring expressed fear, fear of law enforcement officers, to Officer Darress, and again told Officer Darress that the children had fled the scene. So at that point, each officer had at least two indications the children had left and Officer Darress had four indications [33] the off'—the children had left.

Officer Darress testified that at this point he was fairly sure the kids were not in the apartment. Each officer admitted they had no information that anybody else was in the apartment. Officer Darress indicates that while Mr. Herring continued to throw items out of the window, he didn't throw them at Officer Darress. And, again, Officer Darress was within inches to feet of the window. Officer Darress formed the opinion that Mr. Herring was suffering a

mental breakdown or may possibly have been on drugs.

Officer Ambuehl and Officer Carroll arrived approximately a minute after Officer Darress and they approached the scene. They can hear Mr. Herring having a conversation with Officer Darress, but they don't—they don't really know what was said. Within four minutes of Officer Darress arriving at the scene, he instructs the other officers to kick in the door.

Whatever attempts were made by Officer Darress to de-escalate the conflict or to deal with Mr. Herring in a nonconfrontational way occurred within a four-minute period of time. Officers Carroll and Ambuehl kick in the door and enter the apartment. As they go through the apartment as cautious law enforcement officers do, they check the rooms. Nobody else was in the apartment. During this time, the officers testify Mr. Herring continued to speak with Officer [34] Darress. He was making religious statements, he was expressing his fear of law enforcement officers.

Officer Darress instructs Officer Carroll to spray him with OC spray. Now, it's important to note, Your Honor, that Officer Carroll when testifying specifically stated that prior to deploying the OC spray he formed the opinion that Mr. Herring was having a mental health problem. Prior to deploying the OC spray, Mr. Herring did not charge or otherwise engage in any hand-to-hand physical confrontation with police. Prior to deploying the OC spray, he did not move towards officers. Up until that time, the only aggressive act that he had taken was to throw an object at Officer Carroll.

After being sprayed, at that point, there is a full-out confrontation as Mr. White has described. Officer

Darress specifically testified, Your Honor, that he recognized blows to a suspect's neck or pressure applied to a suspect's neck may cause severe injury or death. He indicated that in certain circumstances this would constitute a deadly use of force. He jammed his thumb into the right middle side of Mr. Herring's neck. And, Your Honor, I would note for the record that Mr. White's description of what occurred is not in the record. All he indicates is that jammed this thumb into the right middle side of the neck. It could be here. More likely it was [35] here.

And we know that, Your Honor, because at a point Mr. Herring stopped breathing. At the time that he stopped breathing, he had a strong carotid pulse. What that means, Your Honor, is that he had an airway obstruction as opposed to a cardiovascular collapse. Further support from this, Your Honor, is the fact that when they put him in the ambulance they had it—it took them three times to intubate him. Difficulty intubating is, again, evidence of tracheal damage as opposed to some other type of cardiac event.

I noted, Your Honor, while Mr. White was speaking that our medical expert's report, Dr. Norton (phonetic), her report was submitted in letter form rather than affidavit form. If Your Honor would indulge me until Monday, I could tender an affidavit with the contents of her letter report.

THE COURT: Well, let's see how Mr. White feels about that. Would there be any objection, Mr. White?

MR. WHITE: No, I do not object how it's—

THE COURT: How it's presented.

MR. WHITE:—how it's presented. Right now it's my understanding—just as long as it's the—the substance is not—did not change.

MR. FRANK: The substance would not change, Your Honor. I just note here that it was not submitted in the [36] proper form, and if Court or counsel would like me do that, I certainly would.

MR. WHITE: I do not have an objection.

THE COURT: Okay. I'll allow you to submit an affidavit of Dr. Norton's report with the same information contained in the report attached to your response to the summary judgment motion by Monday—

MR. FRANK: Thank you, Your Honor.

THE COURT:—which is the 21st of November.

MR. FRANK: Your Honor, although medications were administered to Mr. Herring, Haldol and Valium, Mr. Herring died before those medications could even reach his system. It takes 10 to 20 minutes for either of those medications to enter his system. He—he quit breathing and lost pulse within minutes of the medications being administered.

Given these facts, Your Honor, there is a genuine issue of material fact as to whether the officers appropriately or inappropriately escalated the use of force. When analyzing this issue, the testimony regarding the knowledge that the CSPD had as it relates to contact with the mentally ill is very important. Both Chief Velez and each officer, as well as plaintiffs' expert, testified at length regarding what the Colorado Springs Police Department knew as of this date as it related to interaction with the mentally ill.

[37] It should be noted, Your Honor, that the defendants agreed that there are 50,000 mentally ill persons in Colorado Springs out of a population of 500,000. They indicated, Your Honor, that they are oftentimes first responders as it relates to contact with the mentally ill. They indicated at least two of the officers that approximately 15 percent of their calls for service are in relation to the mentally ill. They indicate, Your Honor, that they have had literally hundreds of contacts with the mentally ill.

Chief Velez agrees that agencies, police agencies, have an obligation to train their employees and that this training is required to give them the tools that they require to accomplish their mission.

And then another part of this training is to train the officers so that their actions do not subject the public to risks that would occur, constitutional violations that would occur, if the officers were not properly trained. Chief Velez admits that a reasonable police department will give its officers training on the proper methods to safely contact a person suffering from mental illness. And that the reason for this training, Your Honor, is so that the officer has the tools required to de-escalate the circumstances when faced with the mentally ill or someone undergoing a behavioral disturbance.

[38] Chief Velez and Officer Darress agree that upon arriving at a scene, one of the initial assessments an officer must make is whether that officer is dealing with a mentally ill person because the way the officer deals with that person is paramount in the outcome. All of these things were known by the officers when they arrived at Mr. Herring's apartment.

Each officer testified that an officer's role as it relates to the mentally ill is to de-escalate the situation, that the mentally ill react differently than do other persons, that mentally ill are often afraid of police officers, as Mr. Herring expressed that he was, that mentally ill people oftentimes can become violent if approached, if sudden movements are made. And each officer testifies, Your Honor, that when dealing with a mentally ill person what one needs to do is to de-escalate the circumstance.

Looked at in light of the information that the officers had as it relates to interaction with the mentally ill, as well as their assessments before initiating physical confrontation with Mr. Herring that he was suffering a mental illness, there is a genuine issue of material fact as to whether the defendants' conduct in the seizure unreasonably created the need to use the force.

And, Your Honor, I think it's particularly [39] important to the extent that each of the officers agree that at the time of this altercation and the time that they initiated confrontation, there was no information to contradict the dispatch calls that no weapons were involved. No information to contradict the information that the children had left. No information anyone was in the apartment. The officers didn't see anybody in the apartment. Mr. Herring was outnumbered three to one by officers. Mr. Herring was not trying to flee. They had no reason to believe that Mr. Herring was destroying evidence. They had no reason to believe he was attempting suicide. They had no reason to believe anyone other than him was injured, and they didn't know the nature or extent of his injuries. But what they did know is that the man was mentally ill.

Now, counsel indicates that there is no case directly on point as it relates to this type of circumstance. Well, Your Honor, there are three cases almost exactly on point that come out of the Tenth Circuit. In the Allen vs. Muskogee case, 119 F.3d 837, there was a gentleman who left his home after an altercation with his wife and children. This gentleman was armed. He took ammunition and several guns with him. The altercation was reported to the sheriff's department, and it was described to the sheriff's deputies that this person was armed and [40] that he had threatened others.

The officers were informed that there was an outstanding warrant. The officers were informed that the person was threatening suicide. When the officers approached him he was armed. He was told repeatedly to drop a gun, and he actually—there was some testimony that he actually pointed the gun at officers.

In this case, Your Honor, the Court analyzed the circumstances under the following issue, and that was the reasonableness of the officers' actions as it relates to whether the officers were in danger at the precise moment that they used force and whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.

And in that case, Your Honor, even though the man was armed and Mr. Herring wasn't, even though the man was threatening other people and Mr. Herring wasn't, and even though there was some indication that the person actually pointed a gun at officers, which Mr. Herring never did because he was never armed, there was a genuine issue of material

fact as to whether the officers created the dangerous situation rather than the mentally ill person.

The Myers versus Oklahoma Board of County Commissioners case, 151 F.3d 1313, is applicable, Your Honor, by comparison. In the Myers case, the Court found [41] that there was, as a matter of law, no constitutional violation. And I think, Your Honor, when the Court looks at that case, it lays out—and this was—this was a case which occurred earlier than the Herring incident—it lays out what reasonable police departments are expected to do when confronting a situation.

In the Myers case, again, the report was that the suspect was armed, Mr. Herring wasn't armed. The law enforcement officers approached the place where the suspect was and they began negotiating with him. There were no attempts to negotiate with Mr. Herring. They kicked his door in after less than five minutes. In the Myers case, shots were actually fired at the officers, but the officers continued to engage in negotiations. They obtained a court order. There's no court order here. They had supervisory staff on scene. There was no supervisory staff on scene at the Herring apartment. The gentleman, again, pointed a weapon at officers and the Court found that the actions of the officers in negotiating and obtaining orders and having supervisory personnel present on the scene were what made the actions of the officers reasonable.

The Court goes on, Your Honor, to address the training that the officers receive. The Court notes that the officer has had voluminous training materials relating to the mentally ill. That the officers' own training [42] records show that they received this training. Reference was made to the expert opinion

of the plaintiffs, but the only thing said about the expert opinion is that it was not in the record at the time that the Court made its decision. Your Honor, had the defendants in this case done anything remotely like the defendants in the Myers case, this would have been a very different outcome.

The final case, Your Honor, which we believe to be on point is the Sevier versus City of Lawrence case, 60 F.3d 695. In the Sevier case, the person was intoxicated. The person was armed with a knife. Officers were informed that he had made prior suicide attempts, and he lunged at the officers with the knife. In this case, Your Honor, the district court found that under these circumstances there was a genuine issue of material fact as to whether shooting the gentleman was appropriate, and the Tenth Circuit, for procedural reasons, could not overturn and did not address the propriety of the district court's opinion.

So, Your Honor, it was well known as of May of 2003 that reasonable law enforcement officers had to take care when dealing with the mentally ill. It was known as of this date by these particular officers that their role in contacting the mentally ill was to de-escalate rather than escalate the conflict. They knew specifically in this [43] instance, Your Honor, that the man that they were contacting was suffering a mental illness. Yet despite knowing the appropriate ways to contact the mentally ill and despite knowing that Mr. Herring was mentally ill and despite having no information that he was a threat to any officer or any other person or that any other person was harmed, they kick in his door, they spray him and they apply lethal force and kill the man. There is a

genuine issue of fact, Your Honor, as to whether proceeding in that manner was reasonable.

Now, Your Honor, in his brief, in the defendants' brief they refer to a Fourth Circuit case, Caricofe I believe it's pronounced. And, again, the Caricofe case recognizes that excessive force cases are looked at on an individualized basis. And in that case, rather than being in his own home like Mr. Herring was, the suspect in a hotel where he posed a risk to other guests. The suspect in Caricofe did not respond to attempts to speak with officers. Mr. Herring was actively engaged in discussions with the officers when he—when his door was kicked in. And Caricofe was attempting to flee. Mr. Herring wasn't attempting to flee. He was in his apartment speaking with the officers.

Defendant in their reply indicates that what the plaintiffs refer to in identifying everything that the officers should have done was useful in a classroom setting [44] and not whether officers were reasonable in a given circumstance. Well, Your Honor, this position would virtually eliminate any need for training. An officer's reaction to a situation and whether that officer was reasonable in reacting must be seen in light of how a reasonable officer would act, and how a reasonable officer would act is a function of the training that that officer receives.

Again, Your Honor, in this case, the information that the officers had is that you de-escalate conflicts with the mentally ill. The officers in this case testified kicking in a man's door and spraying him with OC spray is not a de-escalation of the conflict. There is not one single fact pointed out in this record that would suggest that the officers could not have taken more time to deal with this situation in light of the

information they had at the time as to how to deal with the mentally ill.

In addressing the warrantless entry, the defendants continually raise, There could have been more people in there. Well, Your Honor, the Tenth Circuit has specifically addressed the could have been arguments and have rejected those. And, specifically, Your Honor, there's the Guffey versus Wyatt case, 18 F.3d 869 and the U.S. versus Musa case, 401 F.3d at 1208. In each of these cases, Your Honor, the Court looked at an officer's claim that they [45] entered an apartment because of a lack of police knowledge of the inside the residence, and this lack of intelligence is a dangerous situation because you don't know what's in there.

In analyzing this, the Musa court, Your Honor, indicated that this statement is tautological and would apply to virtually all warrants. If that were the standard for making a warrantless entry of a home, the defendants in every case, officers in every case, could indicate, There could have been somebody in there, so we needed to go in. Well, in this case, Judge, they knew the children had left. They didn't see anybody else in there. They were actively engaged in discussing matters with Mr. Herring at the window. They had—they had no reason to believe, no information to believe that there was anyone else that was in there harmed or bleeding. And whatever the injuries were to Mr. Herring, they certainly weren't so severe that he wasn't able to stand at a window and to talk to an officer. And whatever threat he posed to the officer, it wasn't such a great threat that the officer actually moved away from the window.

THE COURT: So you're saying that the fact that the windows were broken everywhere, there's blood all over the place, this man standing in the window with blood all over him, is my understanding, that that doesn't create a [46] situation where the officers—or the officer had reasonable grounds to believe that Mr. Herring's life was in danger.

MR. FRANK: Not under the circumstances, Your Honor. And the reason for that is that he was up and interacting with the officers. There was no indication in any way that he was losing consciousness, that he was bleeding profusely. Did he have blood on him? Yeah. Was there blood on the apartment? Of course there was. But there is nothing to indicate, Your Honor, that in that four-minute period of time the injuries to Mr. Herring were so severe that, given the officers' knowledge and belief that he was mentally ill and given the officers—

THE COURT: Tell me that. How did they know he was mentally ill?

MR. FRANK: Officer Darress specifically testified that based on the information that he received from dispatch, together with his observations of Mr. Herring, he formed the opinion that he was suffering a mental breakdown or was on drugs. That was his exact quote.

He stated this, Your Honor, in a taped interview with the Colorado Springs District Attorney's Office immediately after the incident, and he again reiterated it in deposition. Officer Carroll indicates in deposition that based upon his observation of Mr. Herring, as well as what [47] he could overhear of Mr. Herring saying and based on his training as it relates to the mentally ill, that he formed the opinion

before deploying the OC spray that Mr. Herring was suffering from a mental illness.

So at least two of these officers, Your Honor, the officer that gave the order to kick in the door and the officer that deployed the OC spray, both of them knew prior to the initiation of conflict that this man was mentally ill. And all three of the officers, Your Honor, who had virtually the same information, had been trained that when you're dealing with a mentally ill person you don't escalate the conflict, and yet they did.

The failure to train claim is in large part the gravamen of this case, Your Honor. A single incident of excessive force may be enough to give rise to a policy and practice, and defendant—excuse me, Mr. White correctly states that when there is a single incident violation you must look at whether there was a direct policy made in relation to it. But the case law is very clear, Your Honor, that a failure to train, not only inadequate training but a failure to train, is a policy and is a policy decision of a municipality. And that because of that policy decision, a single act demonstrating a failure to train is sufficient to impose liability under Minnell (phonetic).

Mr. White correctly lays out the four-part test. [48] That is, the officers exceeded the constitutional limitations on the use of force. If the officers, given their knowledge of Mr. Herring's condition and given their knowledge of how you handle that, unreasonably caused the physical confrontation, then this leg of the standard has been met. The use of force must arise under circumstances that constitute a usual and recurring situation with which the police officers must deal.

And, again, Your Honor, the—each officer testified at length that—that they had regular contact with the mentally ill. And the case law, Your Honor, the case law prior to 2003 was such that a municipality would have significant awareness of the violent potential of the mentally ill. Indeed, each of the officers testified that one of the primary reasons for de-escalation was that when you approach the mentally ill, when you startle the mentally ill, when you place the mentally ill in a situation where—where they're unable to deal with the situation because of their illness, there is a potential for violence.

So to suggest that this was not a foreseeable and usual part of police work simply isn't borne out by the record. Inadequate training can demonstrate a deliberate indifference on the part of a city. Officer Darress's training relating to the mentally ill constituted two-tenths of one percent of his training.

[49] THE COURT: Let me interrupt you for a second. You've now had equal time with Mr. White. Are you about through so I can give him some time to do rebuttal?

MR. FRANK: I'll, Your Honor, very quickly go to the last issue because I want to make sure that I cover it, and that is the deprivation of familial relationship. And I'd like to note at the outset, Your Honor, that I think that Mr. White has correctly stated the current state of the law. But as I listened to Mr. White, a thought had occurred to me, and that is if you take the officers' statements as true, that they had a genuine concern that children were in the apartment, then their intervention into that apartment was specifically directed at them. And if it were the officers—again, if you take their statement as true, that—that the officers thought that the

father posed a risk to the children, then their actions were directed at the familial relationship and the Trujillo standard is met.

But, Your Honor, the real record that I would like to make is that Trujillo has been rejected by numerous circuits: the Seventh Circuit, the Ninth Circuit, the Third Circuit, the Eighth Circuit. There is subsequent Tenth Circuit case law, the Medina case and the Archuleta case, which both significantly question the viability of Trujillo and whether a reckless standard would not be the appropriate standard.

[50] Your Honor, it is our position that were the Tenth Circuit en banc to review this matter, they would issue a ruling which is consistent with the other circuits, which is as long as there is reckless conduct and the plaintiffs are within the class of people that would be affected by that reckless conduct, then a deprivation of familial companionship case is made.

THE COURT: But there's—there's no petition for an en banc hearing or anything on that case, is there?

MR. FRANK: There is not, Your Honor.

Your Honor, in the Williams versus City & County of Denver the criticism of the Medina case was that a three judge panel is not at liberty to overrule a circuit precedent established by prior conditions and that there should be a motion for rehearing. When I Shepherdized it, Your Honor, I saw a notation, but I did not actually find the opinion. The notation in Shepherd's is incorrect, and I did it—I searched it every way I could think of to search it, Judge, and I could not find any petition for an en banc hearing or any ruling en banc.

THE COURT: I have another question.

MR. FRANK: Yes, Your Honor.

THE COURT: On this mental illness contention, other than the officer thinking—one officer thinking that Mr. Herring was mentally ill just before he Maced him and [51] the other officer thinking he was dealing with a mentally ill person, did Mr. Herring have any record of mental illness?

MR. FRANK: Yes, Your Honor, and this is particularly important. Each officer testified that when they approach a scene, part of the information that they want to have is whether there is prior officer conduct as it relates to the person they're contacting. In the days before this matter occurred, the Colorado Springs Police Department had been called to an incident at the apartment complex where Mr. Herring was making allegations that his apartment was being entered and there was a man on a street corner and when this man took off his hat it was a signal for people to come into his apartment.

So the Colorado Springs Police Department, Your Honor, had prior contacts with Mr. Herring that would suggest to them, at the very least, that he had some kind of bizarre behavioral pattern. In addition, Your Honor, Mr. Herring was a person that did have a history of mental illness. This—he was functionally mentally ill. He was still able to have custody of and take care of his kids. But the fact of the matter is, Your Honor, he was a sick man.

THE COURT: Okay. Thank you. You've got about five minutes for rebuttal, Mr. White.

[52] MR. WHITE: Thank you, Your Honor.

It seems that a good portion of Mr. Frank's argument is that there is a genuine issue of material fact with regards to the proper use of force, whether the proper use of force was used or, rather, the conduct recreated the need to use such force. However, these are merely ultimate conclusions or opinions. I mean, we're all entitled to our own opinions, but we're not all entitled to our own facts. And the facts are what the facts are, they are not in dispute. Now, the conclusions that can be drawn from those facts, i.e., did the officers act reasonably in the use of force or not, that's a conclusion based upon the facts.

Did the officers' conduct create the need to use more force? That, again, that is a conclusion reached based upon the facts, but the facts themselves are not in dispute. There's not one material fact in dispute in this case. As the Medina versus Cram (phonetic) court found that the conduct right before the need to use the force, well, that's just another way of saying you have to look at the totality of the circumstances, and, certainly, that seems to be the law that has never changed. You look at the totality of the circumstances. What did the officers see, what did the officers know, what were the officers confronted with at that time?

Everything that Mr. Frank spoke about, the [53] knowledge they had coming into it, about somebody banging on the door, no weapons involved at that time, it was only verbal at that time, all of that is a hundred percent accurate. But when the officers got to the place and saw all the destruction and saw all the blood and saw Mr. Herring, did not know if any—two people were in the apartment, things of that nature, it created a reasonable need for the officers to be able to react.

They—the exigent circumstances existed at that time for them to go in. Basically, two things would have—for the officers not to have been found reasonably, you're going to have to find one of two things. One is that they flat out knew that what they were doing violated somebody's constitutional right, and there's absolutely no evidence of that. This is not a situation where they were torturing somebody to get some information and the information that they wanted to obtain outweighed the need for the torture but they knew that they were violating somebody's constitutional right. It's not even close to that.

Secondly, they would have to be found that to be basically an incompetent officer, that no officer under these circumstances could have believed and acted the way they did. And that just does—that seems beyond reason to me to say, Given all of this information they had at the time, that they—that no reasonable officer could have [54] acted this way.

Mr. Frank then cites the case of Allen versus Muskogee, Myers versus Oklahoma Board of County Commissioners and Sevier versus the City of Lawrence for the proposition that these are—cases are right on point. Number one, they really only deal with the facts of whether or not the officers should contact somebody. Not one of them deals with the actual—you know, the use of force after the conduct. Not one case is cited with that. I would respectfully disagree with Mr. Frank and say that the Caricofe case is directly on point, with the exception that he was in a hotel room instead of his own house. The facts are just so closely related it's amazing.

But back to the Allen versus Muskogee case, there was a dispute in fact of that, but it wasn't because—the reason was—wasn't whether the officers were

reasonable or not, that's a conclusion. There was a dispute of fact as to witness testimony and witness—eyewitness testimony. Regarding the—and also with regards to that case, that was a case and where the person was in a car. He was by himself. There was absolutely nobody else right there that could have been injured or he was threatening directly at that time, and he was not injuring himself at that immediate time.

Regarding the Myers versus Oklahoma Board of [55] County Commissioners' case, again, that's a person who's at home alone. The officer spoke with his wife, they knew that. They had time to talk with him. They had time to go get a court order. Obviously, no exigent circumstances existed. He wasn't injuring himself at that time. There was nobody else he was directly threatening. No exigent circumstances.

In the Sevier versus City of Lawrence case, this was a case where the—a boy was eventually in the hallway of his own house, he wasn't threatening anybody else other than maybe the officer right in the hallway. He had not injured himself at that time, and there was a dispute of fact. Not because of whether or not the officers were reasonable, the disputed fact was witness testimony. The officers said the kid lunged at him, the parents said the kid never lunged at them. That was the material disputed fact in that case.

Mr. Frank is exactly right. If the officers would have done something different, maybe a different result would have happened. Maybe. You know, could they have taken more time? Sure, they could have. But we're looking at that with 20/20 hindsight, and we're not permitted to do that. It's very easy for all of

us to sit back and say the officers should have done this, that and the other. But when you put yourself in the officers' position, the on [56] scene officer, and say given everything that they witness, could no officer have been reasonable? That doesn't seem—that amazes me to say that no reasonable officer could have acted this way.

Now, finally with regards to the—specifically the Musa case where Mr. Frank cites that as that you have to basically know what's going on in the house before you react, that case—two things with regards to that case. Number one, that involved a warrant. They were able to go and get a warrant. This obviously was not an exigent circumstances case where they had to go right in, and they were able to get the warrant, there was time on their side.

And, secondly, what he quotes as the dissent in that case, it seems to me that the Caricofe case regarding the use of force is right on point which shows that the officers were reasonable. The Foust case with regards to whether or not the officers should have gone in, which basically says that there—the "could have beens" are something that you do need to take into account, and it is reasonable for an officer to take those in account. That is very closely on point.

I would respectfully submit to this Court that the officers—although the outcome was not good and nobody likes how the outcome happened—the officers acted reasonably and are entitled to qualified immunity in this [57] case. Thank you.

THE COURT: Okay. The orders today are that you're going to file the stipulation to dismiss the state tort claims and Chief Velez by Monday, November 21st. And hearing no objection from Mr. White, Mr.

Frank, you're going to submit the Norton affidavit by the same date, November 21st.

MR. FRANK: That's correct. Thank you, Your Honor.

THE COURT: And I'm going to take the motion for summary judgment, which is docket number 39 filed August 1st, under advisement and a written decision will issue.

And thank you for your arguments, Counsel. I'm going to have you switch places with the people in the back of the courtroom. They're the next case.

MR. FRANK: Thank you.

(Whereupon, the within hearing was then in conclusion at 10:30 a.m. on November 15, 2005.)

I certify that the foregoing is a correct transcript, to the best of my knowledge and belief, from the record of proceedings in the above-entitled matter.

_____ _____

Signature of Transcriber Date

APPENDIX H

DISTRICT COURT, EL PASO COUNTY, COLORADO
20 E. VERMIJO, COLO. SPGS., CO 80903

[Filed Oct 28, 2004]

Case Number: 2004CV1796

The Estate of Gregory Louis Herring, by and through, Carolyn Moore, Personal Representative; Gregory L. Herring, Jr., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; Summer Herring, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and Gregory Q. Herring, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Plaintiffs,

v.

The City of Colorado Springs, a municipal entity; The Colorado Springs Police Department; Luis Velez, or current Chief of the Colorado Springs Police Department, individually and in his official capacity as Chief of the Colorado Springs Police Department; Gary Darress, individually and in his capacity as a Colorado Springs Police Officer; Rory Carroll, individually and in his capacity as a Colorado Springs Police Officer; Brent Ambuehl, Individually and in his capacity as a Colorado Springs Police officer; The Colorado Springs Fire department; Manuel Navarro, or current Chief of the Colorado Springs Fire Department, individually and in his capacity as Chief of the Colorado Springs Fire Department; Clark Gaddie, individually and in his capacity as a Colorado Springs Fire

Fighter; Larry Armstead, individually and in his capacity as a Colorado Springs Fire Fighter; American Medical Response, Inc. a Delaware Corporation; American Medical Response of Colorado, Inc., a Delaware Corporation; Laidlaw Medical Transportation, Inc., a Delaware Corporation; Kevin Collins, individually and as an agent, representative or employee of American Medical Response, Inc., American Medical Response of Colorado, Inc., and Laidlaw Medical Transportation, Inc.,

Defendants

AMENDED COMPLAINT AND JURY DEMAND

COME NOW the Plaintiffs, by and through Counsel, Robert J. Frank, The Law Firm of Robert J. Frank & Assoc., and amends his original Complaint and Jury Demand against the Defendants as follows:

1. This matter arises as a result of the death of Gregory L. Herring on May, 2, 2003, in the city of Colorado Springs while in the custody of the Colorado Springs Police Department.

2. This action arises under the statutes of the state of Colorado, as well as the statutes of the United States, USC Title 42 Section 1983, as stated with more particularity herein.

3. This action arises under the 4th and 14th Amendments to the Constitution of the United States as stated with more particularity hereinafter.

4. This action arises under the common law of the state of Colorado as stated with more particularity herein.

5. The Plaintiff Gregory L. Herring is a minor child whose date of birth is March 27, 2003. The Plaintiff Summer Herring is a minor child whose date of birth is August 26, 1994. The Plaintiff Gregory Q. Herring is a minor child whose date of birth is October 10, 1995. The Estate of Gregory L. Herring is entitled to bring any and all survival actions on behalf of the Decedent. The term "Plaintiffs" shall refer to all Plaintiffs individually and collectively. At all times pertinent hereto, the minor children lived with the Decedent. The Plaintiff's are the estate and minor children of the Decedent Gregory L. Herring who was killed on or about May 2, 2003 in Colorado Springs, El Paso County Colorado. At all times pertinent hereto, the Plaintiffs were residents of and domiciled in the County of El Paso, State of Colorado. Their current residential address is 4195 Waddell Ave. Colorado Springs, CO 80915.

6. Each of the Plaintiffs is under the jurisdiction of the El Paso County District Court, Probate Division. This matter is brought on behalf of the three minor children Plaintiffs by their Guardian Ad Litem and legal representative, Susan Fort. Susan Fort was appointed as Guardian Ad Litem for the Plaintiffs (replacing David Burford, Esq.) in El Paso County District Court case numbers 03PR1077, 03PR1078, and 03PR1079. The Guardian Ad Litem was ordered by the El Paso County District Court to investigate matters associated with the above captioned case and, consistent with C.R.C.P Rule 11, file claims relating to any and all legal remedies available to the Plaintiffs stemming from the Death of Gregory L. Herring. The Guardian Ad Litem's current professional address is P. O. Box 260494, Highlands Ranch, Colorado 80163. This matter is brought on behalf of the Estate of Gregory Louis Herring (natural father

of the three minor children) by Carolyn Moore, the Personal Representative of the Estate of Gregory Louis Herring. The Personal Representative's address is P.O. Box 194, Fountain, Colorado 80817.

7. Defendant City of Colorado Springs is a municipal entity located and operating in El Paso County Colorado. Defendant Colorado Springs Police Department is a professional law enforcement agency acting as an agent of Defendant City of Colorado Springs within El Paso County Colorado. Defendant Colorado Springs Fire Department is a professional fire department acting as an agent of Defendant City of Colorado Springs within El Paso County Colorado.

8. Defendant Gary Darress, is a police officer employed by the Colorado Springs Police Department. He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendant Rory Carroll is a police officer employed by the Colorado Springs Police Department. He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendant Brent Ambuehl is a police officer with the Colorado Springs Police Department. He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendants, Daress, Carroll, and Ambuehl, are government actors, acting within the state of Colorado, County of El Paso.

9. Defendants Clark Gaddie and Larry Armstead are firefighters employed by the Colorado Springs Fire Department. Each are sued individually and in their official capacity as a Colorado Springs firefighters. Defendants Gaddie and Armstead are government actors, acting within the state of Colorado, County of El Paso.

10. Defendant Luis Velez, or current chief, at all times pertinent hereto, was the Chief of the Colorado

Springs Police Department. Defendant Velez, or current chief, was, at all times pertinent hereto, responsible for the hiring, training, policy, and supervision of officers and other persons employed by the Colorado Springs Police Department.

11. Defendant Manuel Navarro, or current chief, at all times pertinent hereto, was the Chief of the Colorado Springs Fire Department. Defendant Navarro, or current chief was, at all times pertinent hereto, responsible for the hiring, training, policy, and supervision of firefighters and other persons employed by the Colorado Springs Fire Department.

12. Defendants American Medical Response, Inc., American Medical Response of Colorado, Inc., and Laidlaw Medical Transportation, Inc. are Delaware corporations conducting business in Colorado Springs. These Defendants are referred to as AMR herein. Their registered agent for service of process is The Corporation Company, 1675 Broadway, Denver Colorado, 80202.

13. Defendant Kevin Collins is a natural person residing in El Paso County Colorado. At all times pertinent hereto, he was an agent representative or employee of Defendant AMR.

14. The term "Defendants" shall refer to all Defendants individually and collectively.

15. All of the acts and activities of the Defendants as alleged herein were actions performed under color of state law.

16. Jurisdiction and venue are appropriate in El Paso County District Court to the extent that state law claims are involved, and all Plaintiffs and Defendants are residents of El Paso County.

II. GENERAL ALLEGATIONS

17. On or about May, 2, 2003 Gregory L. Herring, referred to herein as Decedent, died while in the custody of the Colorado Springs Police Department. His death was directly and proximately caused by the actions of the Defendants as stated herein.

18. On or about May, 2, 2003 the Decedent suffered an acute mental health crisis and began running nude in his apartment complex and destroying his own personal property. Prior to this crisis, the Decedent asked his minor children, the Plaintiffs herein, to leave the apartment. At the time of this crisis, the children were not in the presence of the Decedent and were not in any danger of physical harm. At no time during this crisis did the Decedent threaten harm to any other person.

19. The Colorado Springs Police Department received a call stating that a black male was running nude in an apartment complex causing a disturbance. The call did not allege the identified individual was posing a risk of harm to any person. Likewise, there was no allegation more than one person was involved, drugs or alcohol were involved, or that the individual was armed.

20. Defendants Darrass, Carroll, and Ambuehl arrived at the apartment complex. Defendants contacted a black adult male, later identified as the Decedent, who was in his own apartment which he shared with the Plaintiffs, with the door shut. At the time, the Defendants knew the Decedent was in his own home, was alone, children were not present and Decedent was not a threat to other persons. Defendants knew the Decedent was suffering an acute mental health crisis. Defendant Darress characterized this crisis as "a complete mental breakdown." By

the Defendants' own reports, the Decedent was "acting very bizarre," he was naked, was yelling at officers and throwing items out of the first floor windows (which were broken) onto the grass. The Decedent expressed a concern that the police were there to "hurt him." It appeared as though he was injured and bleeding.

21. No attempts were made by the Defendants to obtain the assistance of a person or persons trained in mental health issues or in dealing with the mentally ill during crisis. The Defendants knew to a moral certainty that they did not have sufficient experience or training to deal with the mentally ill. The Defendants knew or should have known that a hostile and violent response was likely if they were to act in an aggressive and physical manner toward the Decedent.

22. Defendant Darress made the decision to kick in the door to the Plaintiffs' and Decedent's apartment. Defendants Darress, Carroll and Ambuehl entered the apartment by kicking in the door. At the time the Defendants kicked in the door to the Plaintiffs and Decedents' apartment, they had specifically been denied entry by the Decedent, had no warrant, had not attempted to obtain a warrant, and had no probable cause to believe exigent circumstances existed justifying a warrentless entry into the decedent's home. Likewise, Defendants knew or should have known that such violent entry, particularly in a circumstance involving a person suffering an acute mental health crisis would aggravate the situation.

23. Upon kicking in the door, Defendants Darress, Carroll and Ambuehl confronted the Decedent. The Defendants inquired regarding the Decedent's children and he responded they were not in the apart-

ment. The Decedent walked toward the officers, and Defendant Carroll sprayed the Decedent with a chemical spray. It was only after being sprayed that the Decedent engaged in physical conflict with the Defendants. During this conflict, Defendant Darress closed his right fist and was "slamming that down on the suspects head, like a hammer." Defendant Carroll began hitting the Decedent in the head. Defendant Darress hit the Decedent in the head with a baton three to four times. The Decedent was again beaten on the head and then Defendant Darress "jammed his thumb into the right side of his throat." The Decedent was then handcuffed. Defendant Armstead assisted in restraining Decedents' legs and ankles. Decedents' legs were subsequently restrained. The Decedent was subdued at this point. Officer Darress was "jumping up and down" on the decedents' back.

24. A decision was made to use medication in an attempt to calm the Decedent. Defendant Collins prepared and gave the Decedent a shot of Haldol. Defendants Armstead and/or Gaddie immediately thereafter administered shots of Valium and additional Haldol. These shots were prepared by Defendant Collins.

25. Sixty to ninety seconds later the Decedent stopped breathing. The Decedent was transported by ambulance to Penrose Community Hospital. He subsequently expired. The Decedent's death was caused by the actions of the Defendants.

III. FIRST CLAIM FOR RELIEF
Negligence – Below Standard Care Resulting in Death

26. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

27. At all times pertinent hereto, the Defendants owed Plaintiffs and Decedent a duty to exercise reasonable care in the administration of drugs and medications and were required to do so in accordance with accepted standards of care.

28. Defendants as stated herein, including but not limited to Defendants Collins, Gaddie, and Armstead failed to exercise that degree of care required of emergency medical personnel and were negligent. Said negligence included but is not limited to administering medications without consent, administering medications when it was not safe to do so and without ascertaining if it was safe to do so, administering medications in improper combinations, improper time frames, and improper amounts, in failing to properly monitor the decedent after administering said medications, and in failing to recognize and mitigate the medical distress of the Decedent.

29. Defendant AMR is liable for acts and failures to act of its agent and employee Defendant Collins.

30. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

IV. SECOND CLAIM FOR RELIEF
Negligence – Failure to train and Supervise

31. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

32. At all times pertinent hereto, the Defendants, including but not limited to Defendants AMR, Navarro, Colorado Springs Fire Department, Velez, Colorado Springs Police Department and City of Colorado Springs owed Plaintiffs and Decedent a

duty to exercise reasonable care in the training and supervision of its personnel regarding contact with the mentally ill, use of force on the ill and disabled, and administration of drugs and medications and were required to do so in accordance with accepted standards of care.

33. Defendants, as stated herein, failed to properly train or supervise their agents or employees regarding contact and interaction with the mentally ill, use of force on the ill and disabled, and in the administration of medications within accepted standards of care.

34. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

V. THIRD CLAIM FOR RELIEF
Negligence – Wrongful Death

35. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

36. The Defendants' actions as stated herein were negligent and a cause of the death of the Decedent Gregory L. Herring. Plaintiffs are entitled by Colorado Statute to bring claims for the wrongful death of their father and sole means of support, Gregory L. Herring.

37. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

VI. FOURTH CLAIM FOR RELIEF
Willful and Wanton Conduct – Wrongful Death

38. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

39. The Defendants' actions as stated herein were willful and wanton and were a cause of the death of the decedent Gregory L. Herring. Plaintiffs are entitled by Colorado Statute to bring claims for the wrongful death of their father and sole means of support, Gregory L. Herring.

40. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

VII. FIFTH CLAIM FOR RELIEF
Intentional/Negligent Infliction of Emotional Distress

41. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

42. The Plaintiff minor children were present in the zone of danger at the time of the events pled herein and observed the beating that lead to the death of their father.

43. The Defendants intentionally caused Plaintiffs emotional distress.

44. The Defendants negligently caused Plaintiffs emotional distress.

45. As a result, the Plaintiffs have in fact suffered emotional distress with clear manifestations and needing treatment.

46. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

VIII. SIXTH CLAIM FOR RELIEF ENTERY OF HOME VIOLATED THE FOURTH AMENDMENT

47. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

48. As of May 2, 2003, it was clearly established Federal Law, that government officials, including police officers and fire department personnel were prohibited from entering the Plaintiffs' and Decedent's residence absent a showing of probable cause.

49. At the time the Defendants kicked in the door to the Plaintiffs' and Decedents' apartment they had specifically been denied entry by the Decedent, had no warrant, had not attempted to obtain a warrant, and had no probable cause to believe exigent circumstances existed justifying a warrentless entry into the Plaintiffs' and Decedent's home. Likewise, Defendants knew or should have known that such violent entry, particularly in a circumstance involving a person suffering an acute mental health crisis would aggravate the situation.

50. This entry of Decedent's and Plaintiffs' home constitutes a violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights and gives rise to a cause of action pursuant to 42 U.S.C. § 1983.

51. This violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights caused the Plaintiffs injuries, damages, and losses.

IX. SEVENTH CLAIM FOR RELIEF EXCESSIVE USE OF FORCE, VIOLATING THE DECEDENT'S FOURTH AMENTMENT RIGHTS

52. Each and every allegation set forth in the preceding paragraphs IS incorporated herein by this reference with the same effect as if realleged herein.

53. As of May 2, 2003, there existed a clearly recognized federal right pursuant to the Fourth Amendment of the United States Constitution to be free from the objectively unreasonable, and excessive use of force.

54. At the time the Defendants used force against the Decedent, he was mentally ill, did not threaten any officer, did not initiate physical conflict with any officer, did not attempt to flee, did not pose a threat to any officer, did not pose a threat to the public or any other person, was not armed, was vastly outnumbered by law enforcement officers, and given the totality of the circumstances, there was no reason for force to be used.

55. Given the totality of the circumstances existing at the time of the use of force, it was objectively unreasonable for the Defendants to use the level of force used and the amount of force used was well beyond what was necessary under the circumstances.

56. The force used by the Defendants caused the Decedent's death after a prolonged and painful period of time. The nature, and extent of injury to the Decedent up to the time of his death and including his death, far outweighs any need on the part of law enforcement personnel to use such force.

57. This violation of the Decedents' and Fourth and Fourteenth Amendment Rights by Defendants

caused the Decedent and Plaintiff Estate injuries, damages, and losses.

X. EIGHTH CLAIM FOR RELIEF THE CONDUCT OF OFFICERS OF THE COLORADO SPRINGS POLICE DEPARTMENT, FIREFIGHTES AND EMERGENCY MEDICAL TECHNICIANS OF THE COLORADO SPRINGS FIRE DEPARTMENT AND EMERGENCY MEDICAL TECHNICIANS EMPLOYED BY AMR DEMONSTRATES A LACK OF TRAINING AND SUPERVISION RISING TO THE LEVEL OF DELIBERATE INDIFFERENCE TO THE RIGHTS OF PERSONS IN COLORADO SPRINGS IN VIOLATION OF THE 14th AMENDMENT, 42 U.S.C. §1983

58. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

59. On May 2, 2003, there existed a clearly established federal right protecting citizens of the United States from failures of training or supervision of police officers and emergency response personnel which rise to the level of a deliberate indifference to rights of Citizens in violation of the due process requirements of the Fourteenth Amendment.

60. Defendants Velez, Navarro, and AMR are charged with the responsibility of supervising the operations of their personnel and are obligated to assure that their personnel are adequately trained and supervised so that they may carry out their duties without violating the Constitutional Rights of United States citizens.

61. Defendants knew to a moral certainty, that their employees would confront situations wherein

police officers and emergency response personnel would be required to interact with mentally ill persons suffering acute mental health crisis. Such circumstances require close and proper training and supervision by police officials.

62. Defendants were objectively unreasonable in failing to properly supervise and train their police officers and emergency response personnel in interacting with mentally ill persons suffering acute mental health crisis. Such failures include, but an not limited to failures to train regarding resources available to first responders, proper and improper methods of contact and interactions, proper use of force, proper use of restraint, and proper use of medication. This failure to properly train and supervise constituted a deliberate indifference to the rights of the Plaintiffs and Decedent. This failure to properly train and supervise constituted a pattern, policy and practice of the Colorado Springs Fire Department, Colorado Springs Police Department and City of Colorado Springs.

63. In matters regarding a police officer or emergency response personnel interacting with mentally ill persons suffering acute mental health crisis, lack of proper supervision and training will frequently cause a deprivation of a citizen's constitutional rights and at all times pertinent hereto, it was foreseeable that said deliberate indifference would cause harm to the decedent, and to the Plaintiffs herein.

64. This violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights by Defendants caused the Plaintiffs injuries, damages, and losses.

XI. NINTH CLAIM FOR RELIEF DEPRIVATION OF FAMILIAL COMPANIONSHIP AND SOCIETY 14th AMENDMENT, 42 U.S.C. § 1983

65. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

66. As of May 3, 2003, there existed a clearly recognized Federal right pursuant to the Fourteenth Amendment of the United States Constitution to be free from unwarranted state interference in familial companionship and society.

67. The Plaintiffs herein had a clearly recognized constitutional interest in familial companionship and society with the Decedent.

77. By committing the acts alleged herein, the Defendants violated the Plaintiffs' constitutional rights to familial association in causing the death of the Decedent.

78. The Plaintiffs have suffered injuries, damages and losses as a result of this deprivation of constitutionally protected rights.

XII. TENTH CLAIM FOR RELIEF DEPRIVATION OF THE LIFE OF GREGORY L. HERRING UNDER COLOR OF STATE LAW: 4th AMENDMENT, 14th AMENDMENT, 42 U.S.C. §1983

79. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

80. As of May 2, 2003 there existed a clearly recognized federal right pursuant to the Fourth and Fourteenth Amendments of the United States Constitu-

tion to be free from the objectively unreasonable deprivation of life without due process of law.

81. As of May 2, 2003, federal law clearly recognized that a non-state actor is acting under color of state law when he acts as a willful participant in joint action with a state actor acting under color of state law.

82. By committing the acts alleged herein, the Defendants violated the Decedent's constitutional right to be free from an objectively unreasonable deprivation of life without due process of law causing his death after a prolonged and painful period of time. This violation of the Decedents' and Fourth and Fourteenth Amendment Rights by Defendants caused the Decedent and Plaintiff Estate injuries, damages, and losses.

XIII. ELEVENTH CLAIM FOR RELIEF THE CONDUCT OF THE COLORADO SPRINGS POLICE DEPARTMENT WAS SO RECKLESS AND CONSCIENCE SHOCKING AS TO CREATE A SUBSTANTIVE DUE PROCESS VIOLATION PURSUANT TO THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION 14th AMENDMENT, 42 U.S.C. §1983

83. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

84. As of May 2, 2003, there was a clearly recognized federal right stating that official conduct which rises to the level of reckless and conscience shocking behavior creates a substantive due process violation pursuant to the Fourteenth Amendment.

85. The conduct of the Defendants, as stated herein, rises to the level of recklessness, and conscience

shocking behavior so as to create a substantive due process violation pursuant to the Fourteenth Amendment. The Plaintiffs have suffered injuries, damages and losses, as stated herein as a result of the substantive due process violation of their Fourteenth Amendment rights.

XIV. DAMAGES

WHEREFORE, Plaintiffs pray judgment against Defendants individually and collectively as follows:

1. For general damages according to proof;

2. For compensatory damages for all Plaintiffs according to proof;

3. For exemplary damages, as against each police officer, supervisor, and policy maker Defendants in an amount sufficient to deter and make an example of those Defendants;

4. For consequential damages according to proof;

5. For those damages to which the Decedent had been entitled had he survived;

6. For incidental damages according to proof;

7. For prejudgment interest according to proof;

8. For costs of suit, including reasonable attorney's fees and expenses of litigation as provided by federal and state laws, including, but not limited to, 42 U.S.C. §1983;

9. For such further relief as This Honorable Court deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES HEREIN.

Respectfully submitted this 28th day of October, 2004.

THE LAW FIRM OF
ROBERT J. FRANK &
ASSOCIATES, LLC

(A signed original is in file at the Law Offices of Robert J. Frank & Associates, LLC)

BY: ROBERT J. FRANK,
No. 19765

Plaintiffs' Addresses:

Personal Representative of Estate of Gregory Louis Herring: Carolyn Moore, P. O. Box 194, Fountain, Colorado 80817

Minor Children: 4195 Waddell Ave., Colorado Springs, CO 80915

Guardian Ad Litem: Susan Fort, P. O. Box 260494, Highlands Ranch, Colorado 80163

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF COLORADO
Magistrate Judge Patricia A. Coan

[Filed April 20, 2005]

Civil Action No. 04-PC-2429 (BNB)

THE ESTATE OF GREGORY L HERRING, by and through, Carolyn Moore, Representative of The Estate of Gregory L. Herring; GREGORY L HERRING, JR., a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.; SUMMER HERRING, a minor child, by and through her Guardian Ad Litem, Susan Fort, Esq.; and GREGORY Q. HERRING, a minor child, by and through his Guardian Ad Litem, Susan Fort, Esq.

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS, a municipal entity; LUIS VELEZ, Chief of the Colorado Springs Police Department, individually; Luis Velez or current Chief of the Colorado Springs Police Department, in his official capacity as Chief of the Colorado Springs Police Department; GARY DARRESS, individually and in his capacity as a Colorado Springs Police Officer; RORY CARROLL, individually and in his capacity as a Colorado Springs Police Officer; and BRENT AMBUEHL, Individually and in his capacity as a Colorado Springs Police officer,

Defendants.

SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs, by and through Counsel, Robert J. Frank, The Law Firm of Robert J. Frank & Assoc., and amend their original Complaint and Jury Demand against the Defendants as follows:

I. JURSIDICTION AND VENUE

1. This matter arises as a result of the death of Gregory L. Herring on May 2, 2003, in the city of Colorado Springs while in the custody of the Colorado Springs Police Department.

2. This action arises under the statutes of the state of Colorado, as well as the statutes of the United States, USC Title 42 Section 1983, as stated with more particularity herein.

3. This action arises under the 4th and 14th Amendments to the Constitution of the United States as stated with more particularity hereinafter.

4. This action arises under the common law of the state of Colorado as stated with more particularity herein. On or about October 31, 2003, the Plaintiffs, through their former Guardian Ad Litem, David Burford, submitted a notice of claim as to state law claims as required by CRS Section 24-10-109.

5. The Plaintiff Gregory L. Herring is a minor child whose date of birth is March 27, 2003. The Plaintiff Summer Herring is a minor child whose date of birth is August 26, 1994. The Plaintiff Gregory Q. Herring is a minor child whose date of birth is October 10, 1995. Carolyn Moore is the Personal Representative of The Estate of Gregory L. Herring. The Estate of Gregory L. Herring is entitled to bring any and all survival actions on behalf of the Decedent The term "Plaintiffs" shall refer to all

Plaintiffs individually and collectively. At all times pertinent hereto, the minor children lived with the Decedent The Plaintiffs are the Estate and minor children of the Decedent Gregory L. Herring, who was killed on or about May 2, 2003 in Colorado Springs, El Paso County Colorado. At all times pertinent hereto, the Plaintiffs were residents of and domiciled in the County of El Paso, State of Colorado. Their current residential address is 4195 Waddell Ave. Colorado Springs, CO 80915.

6. Each of the Plaintiffs is under the jurisdiction of the El Paso County District Court, Probate Division. This matter is brought on behalf of the three minor children Plaintiffs, by their Guardian Ad Litem and legal representative, Susan Fort. Susan Fort was appointed as Guardian Ad Litem for the Plaintiffs (replacing David Burford, Esq.) in El Paso County District Court case numbers 03PR1077, 03PR1078, and 03PR1079. The Guardian Ad Litem was ordered by the El Paso County District Court to investigate matters associated with the above captioned case and, consistent with C.R.C.P Rule 11, file claims relating to any and all legal remedies available to the Plaintiffs stemming from the death of Gregory L. Herring. The Guardian Ad Litem's current professional address is P.O. Box 260494, Highlands Ranch, Colorado 80163. This matter is brought on behalf of the Estate of Gregory Louis Herring (natural father of the three minor children) by Carolyn Moore, the Personal Representative of the Estate of Gregory Louis Herring. The Personal Representative's address is P. O. Box 194, Fountain, Colorado 80817.

7. Defendant City of Colorado Springs is a municipal entity located and operating in El Paso

County Colorado. Defendant City of Colorado Springs is the proper entity to sue for conduct arising as a result of the actions or failures to act of the Colorado Springs Police Department and its officers and employees.

8. Defendant Gary Darress, is a police officer employed by the Colorado Springs Police Department He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendant Rory Carroll is a police officer employed by the Colorado Springs Police Department He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendant Brent Ambuehl is a police officer with the Colorado Springs Police Department He is sued individually and in his capacity as a Colorado Springs Police Officer. Defendants, Daress, Carroll, and Ambuehl, are government actors, acting under color of law within the state of Colorado, County of El Paso.

9. Defendant Luis Velez, or current Chief, at all times pertinent hereto, was the Chief of the Colorado Springs Police Department Defendant Velez, or current Chief, was, at all times pertinent hereto, responsible for the hiring, training, policy, and supervision of officers and other persons employed by the Colorado Springs Police Department Defendant Velez was personally and individually responsible for implementing and executing the customs, practices and policies, as stated herein, that were the cause of the Defendants' constitutional violations. Defendant Velez individually participated in the formulation or the customs, practices and policies, as stated herein, that were the cause of the Defendants' constitutional violations, individually participated in the failure to train officers in an objectively reasonable fashion,

and individually participated in the failure to supervise officers in an objectively reasonable fashion.

10. The term "Defendants" shall refer to all Defendants individually and collectively.

11. All of the acts and activities of the Defendants as alleged herein were actions performed under color of state law. All of the acts and activities of the Defendants as alleged herein were actions performed during the course and scope of their employment as Colorado Springs Police officers.

12. Jurisdiction and venue are appropriate in El Paso County District Court to the extent that state law claims are involved, and all Plaintiffs and Defendants are residents of El Paso County.

II. GENERAL ALLEGATIONS

13. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

14. On or about May, 2, 2003 Gregory L. Herring, referred to herein as Decedent, died while in the custody of the Colorado Springs Police Department. His death was directly and proximately caused by the actions of the Defendants as stated herein.

15. On or about May, 2, 2003 the Decedent suffered an acute mental health crisis and began running nude in his apartment complex and destroying his own personal property. Prior to this crisis, the Decedent asked his minor children, the Plaintiffs herein, to leave the apartment. At the time of this crisis, the children were not in the presence of the Decedent and were not in any danger of physical harm from the Decedent. They remained within the apartment complex and were within sufficient

proximity to hear and observe the violent response of the Defendants herein. At no time during this crisis did the Decedent threaten harm to any other person.

16. The Colorado Springs Police Department received a call stating that a black male was running nude in an apartment complex causing a disturbance. The call did not allege the identified individual was posing a risk of harm to any person. Likewise, there was no allegation more than one person was involved, drugs or alcohol were involved, or that the individual was armed.

17. Defendants Darrass, Carroll, and Ambuehl arrived at the apartment complex. Defendants contacted a black adult male, later identified as the Decedent, who was in his own apartment which he shared with the Plaintiffs, with the door shut At the time, the Defendants knew the Decedent was in his own home, was alone, children were not present, and Decedent was not a threat to other persons. Defendants knew the Decedent was suffering an acute mental health crisis. Defendant Darress characterized this crisis as "a complete mental breakdown." By the Defendants' own reports, the Decedent was "acting very bizarre," he was naked, was yelling at officers, and throwing items out of the first floor windows (which were broken) onto the grass. The Decedent expressed a concern that the police were there to "hurt him."

18. No attempts were made by the Defendants to obtain the assistance of a person or persons trained in mental health issues or in dealing with the mentally ill during crisis. The Defendants knew to a moral certainty that they did not have sufficient experience or training to deal with the mentally ill. The Defendants knew or should have known that a

hostile and violent response was likely if they were to act in an aggressive and physical manner toward the Decedent.

19. Defendant Darress made the decision to kick in the door to the Plaintiffs' and Decedent's apartment Defendants Darress, Carroll and Ambuehl entered the apartment by kicking in the door. At the time the Defendants kicked in the door to the Plaintiffs and Decedents' apartment, they had specifically been denied entry by the Decedent, had no warrant, had not attempted to obtain a warrant, and had no probable cause to believe exigent circumstances existed justifying a warrantless entry into the decedent's home. Likewise, Defendants knew or should have known that such violent entry, particularly in a circumstance involving a person suffering an acute mental health crisis would aggravate the situation.

20. Upon kicking in the door, Defendants Darress, Carroll and Ambuehl confronted the Decedent The Defendants inquired regarding the Decedent's children, and he responded they were not in the apartment The Decedent walked toward the officers, and Defendant Carroll sprayed the Decedent with a chemical spray. It was only after being sprayed that the Decedent engaged in physical conflict with the Defendants. During this conflict, Defendant Darress closed his right fist and was "slamming that down on the suspects head, like a hammer." Defendant Carroll began hitting the Decedent in the head. Defendant Darress hit the Decedent in the head with a baton three to four times. The Decedent was again beaten on the head and then Defendant Darress "jammed his thumb into the right side of his throat" The Decedent was then handcuffed. Defendant Armstead

assisted in restraining Decedents' legs and ankles. Decedents' legs were subsequently restrained. The Decedent was subdued at this point Officer Darress was "jumping up and down" on the decedents' back.

21. A decision was made to use medication in an attempt to calm the Decedent. Decedent was given a shot of Haldol. Immediately thereafter, Decedent was given shots of Valium and additional Haldol.

22. Sixty to ninety seconds later, the Decedent stopped breathing. The Decedent was transported by ambulance to Penrose Community Hospital. He subsequently expired. The Decedent's death was caused by the actions of the Defendants.

III. FIRST CLAIM FOR RELIEF

Gross Negligence/Willful and Wanton Conduct-Failure to train and Supervise

23. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

24. At all times pertinent hereto, the Defendants, City of Colorado Springs and Velez, or current Chief of the Colorado Springs Police Department owed Plaintiffs and Decedent a duty to exercise objectively reasonable care in the training and supervision of its personnel, including training regarding contact with the mentally ill, use of force on the ill and disabled, and use of chemical sprays and were required to do so in accordance with accepted standards of care.

25. Defendants, as stated herein, failed to properly train or supervise their agents or employees regarding contact and interaction with the mentally ill, use of force on the ill and disabled, and in the use of chemical sprays within accepted standards of care.

By information and belief, the Defendants provided inadequate or no training relating to responding to calls involving the mentally ill, inadequate or no training regarding the appropriate use of force regarding the mentally ill, inadequate or no training as to how chemical sprays should and should not be used, particularly with the mentally ill, and inadequate or no training regarding the resources available to officers responding to calls involving the mentally ill. By information and belief, a sergeant or other senior officer was not called to the scene of the incident in a timely fashion. By information and belief no person trained in dealing with the mentally ill was called to the scene in a timely fashion. The failures of training, the failures of supervision, and the failures to provide on-scene officers with the resources necessary to respond to a reasonably foreseeable circumstance constituted gross negligence and/or willful and wanton conduct This failure of training and supervision were so ingrained as to constitute a custom, policy and practice of the Colorado Springs Police Department.

26. Defendant Velez was personally and individually responsible for implementing and executing the customs, practices and policies, as stated herein, that were the cause of the Decedent's death. Defendant Velez individually participated in the formulation of the customs, practices and policies, as stated herein, that were the cause of the Decedents death, individually participated in the failure to train officers in an objectively reasonable fashion, and individually participated in the failure to supervise officers in an objectively reasonable fashion.

27. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

IV. SECOND CLAIM FOR RELIEF

Gross Negligence—Wrongful Death

28. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

29. The Defendants' actions as stated herein were grossly negligent and a cause of the death of the Decedent Gregory L. Herring. Plaintiffs are entitled by Colorado Statute to bring claims for the wrongful death of their father and sole means of support, Gregory L Herring.

30. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

V. THIRD CLAIM FOR RELIEF

Willful and Wanton Conduct—Wrongful Death

31. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

32. The Defendants' actions as stated herein were willful and wanton and were a cause of the death of the decedent Gregory L. Herring. Plaintiffs are entitled by Colorado Statute to bring claims for the wrongful death of their father and sole means: of support Gregory L. Herring.

33. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

VI. FOURTH CLAIM FOR RELIEF

Intentional/Negligent Infliction of Emotional Distress

34. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

35. The Plaintiff minor children were present in the zone of danger at the time of the events pled herein, were subjected to an unreasonable risk of harm and observed the beating that lead to the death of their father.

36. The Defendants intentionally caused Plaintiffs emotional distress.

37. The Defendants grossly negligently caused Plaintiffs emotional distress.

38. As a result, the Plaintiffs have in fact, suffered emotional distress with dear manifestations and needing treatment.

39. As a direct and proximate cause of the actions of the Defendants, the Plaintiffs sustained injuries, damages and losses.

VII. FIFTH CLAIM FOR RELIEF

ENTERY OF HOME VIOLATED
THE FOURTH AMENDMENT

40. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

41. As of May 2, 2003 , it was clearly established Federal Law that government officials, including police officers were prohibited from entering the Plaintiffs' and Decedent's residence absent a showing of probable cause.

42. At the time the Defendants kicked in the door to the Plaintiffs' and Decedents' apartment, they had specifically been denied entry by the Decedent, had no warrant, had not attempted to obtain a warrant; and had no probable cause to believe exigent circumstances existed justifying a warrantless entry into the Plaintiffs' and Decedent's home. Likewise, Defendants knew or should have known that such violent entry, particularly in a circumstance involving a person suffering an acute mental health crisis, would aggravate the situation.

43. This entry of Decedent's and Plaintiffs' home constitutes a violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights and gives rise to a cause of action pursuant to 42 U.S.C. § 1983.

44. This violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights caused the Plaintiffs injuries, damages, and losses.

VIII. SIXTH CLAIM FOR RELIEF

EXCESSIVE USE OF FORCE, VIOLATING THE DECEDENT'S FOURTH AMENTMENT RIGHTS

45. Each and every allegation set forth in the preceding paragraphs IS incorporated herein by this reference with the same effect as if realleged herein.

46. As of May 2, 2003, there existed a clearly recognized federal right pursuant to the Fourth Amendment of the United States Constitution to be free from the objectively unreasonable, and excessive use of force.

47. At the time the Defendants used force against the Decedent, he was mentally ill, did not threaten any officer, did not initiate physical conflictwith any officer, did not attempt to flee, did not pose a threat

to any officer, did not pose a threat to the public or any other person, was not armed, was vastly outnumbered by law enforcement officers, and given the totality of the circumstances, there was no reason for force to be used.

48. Given the totality of the circumstances existing at the time of the use of force, it was objectively unreasonable for the Defendants to use the level of force used and the amount of force used was well beyond what was necessary under the circumstances.

49. The force used by the Defendants caused the Decedent's death after a prolonged and painful period of time. The nature, and extent of injury to the Decedent up to the time of his death and including his death, far outweighs any need on the part of law enforcement personnel to use such force

50. This violation of the Decedents' and Fourth and Fourteenth Amendment Rights by Defendants caused the Decedent and Plaintiff Estate injuries, damages, and losses.

IX. SEVENTH CLAIM FOR RELIEF

THE CONDUCT OF THE DEFENDANTS DEMONSTRATES A LACK OF TRAINING AND SUPERVISION RISING TO THE LEVEL OF DELIBERATE INDIFFERENCE TO THE RIGHTS OF PERSONS IN COLORADO SPRINGS IN VIOLATION OF THE 14th AMENDMENT, 42 U.S.C. §1983

51. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

52. On May 2,. 2003, there existed a clearly established federal right protecting citizens of the

Unified States from failures of training or supervision of police officers and emergency response personnel which rise to the level of a deliberate indifference to rights of citizens in violation of the due process requirements of the Fourteenth Amendment

53. Defendant Velez was charged with the responsibility of supervising the operations of Colorado Springs Police Department personnel and was obligated to assure that said personnel were adequately trained and supervised so that they may carry out their duties without violating the Constitutional Rights of United States citizens. Defendant Velez, or current Chief, was, at all times pertinent hereto, responsible for the hiring, training, policy, and supervision of officers and other persons employed by the Colorado Springs Police Department. Defendant Velez was personally and individually responsible for implementing and executing the customs, practices and policies, as stated herein. Defendant Velez individually participated in the formulation or the customs, practices and policies, as stated herein.

54. Defendant Velez knew to a moral certainty, that Colorado Springs Police Department employees would confront situations wherein police officers would be required to interact with mentally ill persons suffering acute mental health crisis. Such circumstances require dose and proper training and supervision by police officials.

55. Defendants were objectively unreasonable in failing to properly supervise and train their police officers in interacting with mentally ill persons suffering acute mental health crisis. Such failures include, but are not limited to failures to train regarding resources available to first responders, proper and improper methods of contact and

interactions, proper use of force, proper use of restraint, proper us of chemical sprays and proper use of medication. This failure to properly train and supervise constituted a deliberate indifference to the rights of the Plaintiffs and Decedent. This failure to properly train and supervise constituted a pattern, policy and practice of the Colorado Springs Police Department and City of Colorado Springs.

56. In matters regarding a police officer interacting with mentally ill persons suffering acute mental health crisis, lack of proper supervision and training will frequently cause a deprivation of a citizen's constitutional rights and at all times pertinent hereto, it was foreseeable that said deliberate indifference would cause harm to the decedent, and to the Plaintiffs herein.

57. This violation of the Plaintiffs' Fourth and Fourteenth Amendment Rights by Defendants caused the Plaintiffs injuries, damages, and losses.

X. EIGHTH CLAIM FOR RELIEF

DEPRIVATION OF FAMILIAL COMPANIONSHIP AND SOCIETY 14th AMENDMENT, 42 U.S.C § 1983

58. Each and every allegation set forth in the preceding paragraphs isincorporated herein by this reference with the same effect as if realleged herein.

59. As of May 3, 2003, there existed a dearly recognized Federal right pursuant to the Fourteenth Amendment of the United States Constitution to be free from unwarranted state interference in familial companionship and society.

60. The Plaintiffs herein had a dearly recognized constitutional interest in familial companionship and society with the Decedent.

61. By committing the acts alleged herein, the Defendants violated the Plaintiffs' constitutional rights to familial association in causing the death of the Decedent.

62. The Plaintiffs have suffered injuries, damages and losses as a result of this deprivation of constitutionally protected rights.

XI. NINTH CLAIM FOR RELIEF

DEPRIVATION OF THE LIFE OF GREGORY L. HERRING UNDER COLOR OF STATE LAW: 4th AMENDMENT, 14th AMENDMENT, 42 U.S.0 §1983

63. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

64. As of May 2, 2003 there existed a clearly recognized federal right pursuant to the Fourth and Fourteenth Amendments of the United States Constitution to be free from the objectively unreasonable deprivation of life without due process of law.

65. As of May 2, 2003, federal law clearly recognized that a non-state actor is acting under color of state law when he acts as a willful participant in joint action with a state actor acting under color of state law.

66. By committing the acts alleged herein, the Defendants violated the Decedent's constitutional right to be free from an objectively unreasonable deprivation of life without due process of law causing his death after a prolonged and painful period of time. This violation of the Decedents' and Fourth and

Fourteenth Amendment Rights by Defendants caused the Decedent and Plaintiff Estate injuries, damages, and losses.

XII. TENTH CLAIM FOR RELIEF

THE CONDUCT OF THE COLORADO SPRINGS POLICE DEPARTMENT WAS SO RECKLESS AND CONSCIENCE SHOCKING AS TO CREATE A SUBSTANTIVE DUE PROCESS VIOLATION PURSUANT TO THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION 14th AMENDMENT, 42 U.S.C. §3983

67. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if realleged herein.

68. As of May 2, 2003, there was a clearly recognized federal right stating that official conduct which rises to the level of reckless and conscience shocking behavior creates a substantive due process violation pursuant to the Fourteenth Amendment.

69. The conduct of the Defendants, as stated herein, rises to the level of recklessness, and conscience shocking behavior so as to create a substantive due process violation pursuant to the Fourteenth Amendment. The Plaintiffs have suffered injuries, damages and losses, as stated herein as a result of the substantive due process violation of their Fourteenth Amendment rights.

VII. DAMAGES

WHEREFORE, Plaintiffs pray judgment against Defendants individually and collectively as follows:

1. For general damages according to proof;

2. For compensatory damages for all Plaintiffs according to proof;

3. For exemplary damages, as against each police officer, supervisor, and policy maker Defendants in an amount sufficient to deter and make an example of those Defendants;

4. For consequential damages according to proof;

5. For those damages to which the Decedent had been entitled had he survived;

6. For incidental damages according to proof;

7. For prejudgment interest according to proof;

8. For costs of suit, including reasonable attorney's fees and expenses of litigation as provided by federal and state laws, including, but not limited to, 42 U.S.C. §1983;

9. For such further relief as This Honorable Court deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES HEREIN.

DATED: this 20th day of April, 2005.

THE LAW FIRM OF ROBERT J. FRANK & ASSOCIATES, LLC

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APPENDIX J

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 21—CIVIL RIGHTS

SUBCHAPTER I—GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.)